

Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover

(An Essay on Racial Segregation at Bob Jones University, Patrilineal
Membership Rules, Veiling, and Jurisgenerative Practices)

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I. GENERATIVE INSIGHTS, FROM THE “SMALL AND PRIVATE” TO THE “IMMENSE AND PUBLIC”

Law *in action* is a familiar phrase in legal circles that have come to accept that law “on the books” does not necessarily mean its translation into life. But lawmaking *through* community action is less commonly perceived to be plausible in liberal secular nation-states such as the United States. Although the production of law is seen as an artifact of social and political movements (as well as a tool to organize them) and legal interpretation is understood to be affected by political views, law is also

* Arthur Liman Professor of Law, Yale Law School. All rights reserved, 2005. Thanks are due to Steven Fraade and Tony Kronman for shaping the conference, *Rethinking Nomos and Narrative: Marking Twenty Years Since Robert Cover's Nomos and Narrative*, held in April of 2004, as well as to the participants, including Robert Post, whose essay prompted this one. I also thank Denny Curtis, whose reading and knowledge of Robert Cover's work helped me think about the issues discussed here, Cynthia Merrill for her thoughtful comments on an earlier draft and her subsequent editorial and research efforts, and Marin Levy, Paige Herwig, and Gene Coakley for unusually able research assistance, to Nus Choudhury for her work on the subject of veiling, and to James Whitman and Gwénalé Calvès for suggestions on sources about women's suffrage in France. Over the years, my understanding of Robert Cover's ideas and of commitments to communities of faith have deepened through discussions with Owen Fiss, Laura Geller, Karla Goldman, Ron Garet, Vicki Jackson, Martha Minow, James Ponet, Tanina Rostain, Richard Schottenfeld, Avi Soifer, and Steve Wizner.

Having had the good fortune of working with Bob Cover for several years, including on our casebook *Procedure* (co-authored by Cover, Owen Fiss, and myself and published by Foundation Press in 1988), this note acknowledging collegial support would be bare without a thank you to Bob, who remains for me an exemplar of a teacher unromantically committed to spending his energies and devoting his stunning intellect to enhancing human flourishing. I am grateful to the symposium conveners for prompting this rereading of one of Bob's major works, and I am indebted to Bob, for continuing to teach us all.

presumed to have some autonomy from politics and social movements. Given these assumptions, official organs within a polity—such as courts, legislatures, and the executive—can be readily identified as “the lawmakers,” and members of that polity who seek to change law are channeled into certain routes to address those authoritative figures.

That vision of law is incomplete, as was powerfully explained by Robert Cover in *Nomos and Narrative*.¹ There, Cover gave himself the task of capturing and explaining central yet under-appreciated aspects of what he called “‘meaning’ in law.”² Cover aspired to expand the inquiry (and hence our understanding) of legal actors and processes to encompass a “normative universe . . . held together by the force of interpretative commitments—some small and private, others immense and public.”³

Cover aimed to disrupt the impression that state-based legal regimes naturally flower where law is sparse. Rather, Cover insisted, at times the state generates law to impose a singularity on the multiplicity of lawmaking that is intrinsic, dynamic, and ongoing when individuals live within self-conscious paideic communities that are inevitably “*jurisgenerative*.”⁴ Within Cover’s frame, such community lawmaking is not aberrational but commonplace. And, at times, that generativity conflicts with the laws of a liberal state, which may respond by acting imperially to impose a “unified meaning”—its own law—on disparate and competing legal regimes.⁵

Cover’s understanding of law is thus radically different from conceptions that separate the public from the private, the secular from the religious, daily life from conflict about law’s meaning, and hence the force of law from the ordinary but coordinated activities of individuals. As Cover described community-based lawmaking, its generative capacity comes from a membership for whom the public/private delineations have little relevance. Rather, through regular acts of affiliation, community members *live* law’s meaning. Many of their private acts are inevitably also public acts of obedience to law.

The distinction between, as well as the conflation of, public and private obedience depends upon two factors: the form taken by communal or religious obligations and the content of a nation-state’s laws. Some people (the majority in social orders described as “secular”) are committed to sub-communities or religions that segregate acts of affiliation by placing them primarily inside households or special buildings (churches, synagogues,

1. Robert M. Cover, *The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) [hereinafter Cover, *Nomos and Narrative*].

2. *Id.* at 6.

3. *Id.* at 7.

4. *Id.* at 15.

5. *Id.*

clubs) and by limiting the performance of certain obligations to special days or places. For members of such groups, the tension between their “private” affiliations to particular communities of culture and their conformance to the norms of a liberal nation-state is not acute.

In contrast, if one adheres to a community or a religion in which one must always, for example, wear a head covering, fast during daylight hours for a month-long span, or say prayers several times a day, the capacity to separate one’s communal obligations from one’s role as a member of a nation-state diminishes. At times, direct conflict erupts. These examples show that the norms of the public space are not neutral. Dominant practices inevitably create a baseline against which other behaviors are assessed as properly a public (here meaning seen by others) display or as deviant.⁶

A central example of such tensions for Robert Cover—writing in the early 1980s—came from the Supreme Court decision addressing the practices of Bob Jones University,⁷ a Christian religious organization that was unaffiliated with a particular denomination and that ran a school for children as well as a university.⁸ Founded in 1927 in Florida, Bob Jones had moved in the late 1940s to South Carolina where, in 1952, it was established as an eleemosynary corporation.⁹ The University had an unusual reading of Christian scriptures, interpreted to forbid “interracial dating and marriage.”¹⁰ Initially, the University had admitted only whites. Upon ending that practice, Bob Jones banned interracial social interactions among its students.

Because of Bob Jones’ racist policies, the Internal Revenue Service withdrew the University’s exemption from federal taxes, and the University protested.¹¹ As the University explained when seeking Supreme Court review to maintain its federal tax-exempt status as a charitable institution, a trial judge had found that the “cornerstone” of its belief was “Christian religious indoctrination, not isolated academics.”¹² All of its teachers were required to be “born again” Christians, and all of

6. See generally Nomi Maya Stolzenberg, “He Drew a Circle That Shut Me Out”: Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 501 (1993).

7. See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), discussed by Cover in *Nomos and Narrative*, *supra* note 1, at 26-29, 62-67. The decision also decided the companion case of *Goldsboro Christian Schools, Inc. v. United States*, No. 81-1 (1982 term), 436 F. Supp. 1314 (E.D.N.C. 1977), *aff’d*, 644 F.2d 879 (4th Cir. 1981) (without a reported opinion).

8. See *Bob Jones Univ. v. United States*, 468 F. Supp. 890, 893-94 (D.S.C. 1978). In one phase of the litigation, Bob Jones described itself as “the world’s most unusual university.” See *Bob Jones Univ. v. Simon*, 416 U.S. 725, 734 (1974).

9. *Bob Jones Univ. v. United States*, 468 F. Supp. at 893.

10. *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983).

11. Cover, *Nomos and Narrative*, *supra* note 1, at 62.

12. Petition for a Writ of Certiorari at 5, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (No. 81-3) (citing *Bob Jones Univ. v. United States*, 468 F. Supp. 890, 894 (D.S.C. 1978), *rev’d*, 639 F.2d 147 (4th Cir. 1980) [hereinafter *Bob Jones Petition for Certiorari*], reprinted in 136 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, 1982 TERM SUPPLEMENT 3, 13 (Philip B. Kurland & Bernhard Casper eds., 1984) [hereinafter 136 LANDMARK].

its students were “screened as to their religious beliefs,” which included a view (found “genuine” by the federal courts) of a biblical injunction against interracial marriage.¹³ In short, Bob Jones University was what Cover called “a normative community”¹⁴ whose internal understandings of its legal obligations came (over time) to conflict with the law of the United States.

For current readers, so accustomed to the impermissibility of intentional racial segregation, a more recent set of events should help to underscore why *Bob Jones University v. United States* was once not so “easy” a case. A contemporary illustration of contestation between the norms of the liberal-state and those of communities of affiliation is the debate about whether Muslim girls living in France may wear headscarves in public schools.¹⁵ As I will detail below, this conflict parallels that about Bob Jones University in terms of the intensity of the debate and the claim of a right to a distinctive practice. But the two examples also differ in important dimensions. Today, it is hard to imagine a ban on interracial social relations as good for anyone, nor did one in the 1980s hear support of that practice from African-Americans. In contrast, some proponents of veiling argue that it empowers and protects girls and, moreover, some proponents of veiling *are* girls and women.¹⁶ Thus, a foray to France and its lawmaking and debates about veiling are in order.

In the late 1980s, three girls, wearing headcoverings, were prevented from attending their schools on the grounds that their clothing violated “the principle of *laïcité*.” That term—a complex and debated aspect of the French social order—is today translated as an insistence that public spaces such as schools be set apart from religious activities and symbols.¹⁷ Thereafter, in 1989, France’s Conseil d’État ruled that some manifestations of religious beliefs were appropriate as long as they were not ostentatious. That

13. Bob Jones Petition for Certiorari at 5-6, *reprinted* in 136 LANDMARK, *supra* note 12, at 13-14. According to the Government’s filing in response, Bob Jones University provided such education from kindergarten through graduate school. Brief of the United States on Petitions for Writs of Certiorari in *Goldsboro Christian Schools, Inc. v. United States*, and *Bob Jones Univ. v. United States* 3 (Nos. 81-1 & 81-3), *reprinted* in 136 LANDMARK at 24, 30 [hereinafter U.S. Government Certiorari Response of September 1981].

14. Cover, *Nomos and Narrative*, *supra* note 1, at 62.

15. The shorthand sometimes used for this issue is “*l’affaire du foulard*,” referring to the debate about women wearing a chador, a hijab or a niqub, which are kinds of veils used in various Muslim communities. See SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* 182-98 & 185 n.4 (2005). While a good deal of the discussion focuses upon the events in France, parallel conflicts have emerged in other countries. See, e.g., Axel Frhr. von Campenhausen, *The German Headscarf Debate*, 2004 BYU L. REV. 665; Nilüfer Göle, *Contemporary Islamist Movements and New Sources for Religious Tolerance*, 2 J. HUM. RTS. 17, 26-29 (2003) (addressing the use of headscarves in Turkey).

16. See generally NILÜFER GÖLE, *THE FORBIDDEN MODERN: CIVILIZATION AND VEILING* 2-5 (6th prtg. 2003) and discussion *infra*, notes 190-198 and accompanying text.

17. See T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 421-23, 428-42. Gunn argues that translating *laïcité* as “secularity” is neither exact nor appropriate.

judgment permitted educators some discretion but did not quiet the discord.¹⁸

The Ministry of Education issued guidelines on what could be worn and did so again in 1994.¹⁹ Nevertheless, the Conseil d'État was called upon to render decisions in almost fifty cases; one account concludes that about eighty percent of the rulings were against school officials who had banned headscarves.²⁰

Although an advisory body reported in 2000 that the issue had quieted, by 2003 members of the government (then a part of the Union for a Popular Movement, described as a "conservative" party) insisted that headscarves be banned "absolutely."²¹ Soon thereafter, members of the Socialist Party joined in support of a prohibition on "all external signs of religious adherence."²² In December of 2003, a presidentially-appointed commission chaired by Bernard Stasi issued a report ("the Stasi Report") that had many recommendations but which has become known for one: its call for a ban on the wearing of "clothing and signs manifesting religious or political affiliations" in public schools.²³ Within less than three months, the French Parliament turned that proposition into a legal prohibition in schools on clothes and symbols that "conspicuously manifest a religious affiliation"²⁴—

18. Gunn described the decision, *Avis Du Conseil D'État* No. 346893 (Nov. 27, 1989), as concluding that under the French Constitution of 1958, legal requirements in other provisions, and France's international law obligations, respect for the "freedom of conscience of the students" would sometimes entail permitting the wearing of religious clothing or symbols. On the other hand, school officials could prevent efforts aimed at propagandizing others or disrupting school functions. See Gunn, *supra* note 17, at 455-56; see also Elisa T. Beller, *The Headscarf Affair: The Conseil d'État on the Role of Religion and Culture in French Society*, 29 TEX. INT'L L.J. 581, 584-85, 614-15 (2004) (discussing the initial ruling and some of its consequences). Specifically, the ruling provided: "[u]n refus d'admission dans une école d'un élève nouvellement inscrit ou un refus d'inscription dans un collège ou un lycée ne serait justifié que par le risque d'une menace pour l'ordre dans l'établissement ou pour le fonctionnement normal du service de l'enseignement."

The full decision and other materials can be found in a volume, hereinafter *LIBERTÉ RELIGIEUS*, produced under the direction of Bernard Jeufroy and François Tricard, on behalf of the Secrétariat général de la Conférence des évêques de France. See *LIBERTÉ RELIGIEUS ET RÉGIMES DES CULTES EN DROIT FRANÇAIS: TEXTES, PRATIQUE ADMINISTRATIVE, JURISPRUDENCE* 1031-34 (1996) (quoting "L'Actualité juridique-Droit administratif, 20 janvier 1990, pp. 39-42). The compilation was intended, according to the preface by Monseigneur Joseph Duval, President of that Conference, to facilitate access to and understanding of the relevant laws pertaining to religious liberty as debates were underway. Further, he explained, by publishing this compilation, Catholics were discharging their civil obligations and exercising their rights (but were not the only ones to do so) when distributing information to enable appreciation of the complexity of the issues. *Id.* at 3-4 (my paraphrasing).

19. See *LIBERTÉ RELIGIEUS*, *supra* note 18, at 1035-36; Gunn, *supra* note 17, at 457.

20. Gunn, *supra* note 17, at 457. See also Beller, *supra* note 18, at 584-86, 609-23.

21. See Gunn, *supra* note 17, at 459 & n.166 (citing an April 2003 interview with Jean-Pierre Raffarin, Prime Minister of France).

22. *Id.* at 461 (quoting Laurent Fabius, "le Principe émancipateur et unificateur de la laïcité," available at <http://www.psinfo.net/entretiens/fabius/laicite.html> (last visited March 14, 2005)).

23. Commission de Reflexion Sur L'Application du Principe de Laïcité dans La Republique: Rapport Au President de La Republique (remis le 11 décembre, 2003), available at <http://lesrapports.ladocumentationfrancaise.fr/BRP/034000725/0000.pdf> (last visited March 14, 2005) [hereinafter Stasi Report].

24. Law No. 2004-228 of Mar. 15, 2004, J.O., Mar. 17, 2004 p. 5190. The French provision states: "Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit."

and thereby set off another wave of activity and commentary.²⁵ Freedom of expression, freedom of religion, tolerance, women's equality, and the role of Christianity in a social order are all in play.

Return then to the United States and the early 1980s to consider claims also argued in terms of religion, tolerance, and equality. The supporters of Bob Jones University argued it had a constitutional right as a religious organization to maintain both its recognition as a charitable institutional and its practice of racial exclusivity. Proponents situated their claim as one of many instances in which a secular government sought to undermine what communities understood to be obligatory acts willed by God.²⁶ Cover quoted from one amicus brief, submitted on behalf of the Church of God in Christ, Mennonite, to highlight the impact of conflict on communities that were at once insular and yet also a part of or dependent upon interactions with a secular state.²⁷

Our faith and understanding of scripture enjoin respect and obedience to the secular governments under which we live. . . . Our religious beliefs, however, are very deeply held. When these beliefs collide with the demands of society, our highest allegiance must be toward God.²⁸

The *cri de couer* was that such collisions were "*the crisis from which we would be spared*" if the United States Constitution's own commitment to freedom of religion were properly understood.²⁹

25. See discussion *infra* notes 190-98 and accompanying text.

26. See Brief Amicus Curiae in Support of Petition for Writ of Certiorari on Behalf of Church of God in Christ, Mennonite at 3, 461 U.S. 574 (1983) (Nos. 81-1 & 81-3) [hereinafter Mennonite Bob Jones Brief]. This brief—filed in relation to the pending petition for certiorari—is not reproduced in the 136 LANDMARK Compilation dedicated to the *Bob Jones* litigation.

That compilation includes three amicus briefs in support of Bob Jones's position on the merits. See Brief Amici Curiae of the American Baptist Churches in the U.S.A. joined by the United Presbyterian Church of the U.S.A., 136 LANDMARK, *supra* note 12, at 288-307 [hereinafter Baptist/Presbyterian Bob Jones Brief]; Brief Amicus Curiae of the Center for Law and Religious Freedom of the Christian Legal Society in Support of Petitioner, 136 LANDMARK, *supra* note 12, at 308-326; Brief of the National Association of Evangelicals, as Amicus Curiae in Support of Petitioner, 136 LANDMARK, *supra* note 12, at 637-661 [hereinafter Evangelicals Bob Jones Brief].

Three other amici briefs, filed on behalf of Bob Jones at various stages, are not included in the Landmark Compilation. See Brief Amicus Curiae in Support of Petition for Writ of Certiorari on Behalf of the National Committee for Amish Religious Freedom, 461 U.S. 574 (1983) (No. 81-3) [hereinafter Amish Bob Jones Brief]; Motion for Leave to File Brief Amicus Curiae and Brief of Congressman Trent Lott, Pro Se Amicus Curiae, 461 U.S. 574 (No. 81-3) [hereinafter Lott Bob Jones Amicus Filing]; Brief of the National Jewish Commission on Law and Public Affairs as Amicus Curiae, 461 U.S. 574 (1983) (Nos. 81-1 & 81-3) [hereinafter COLPA Bob Jones Brief].

27. See Cover, *Nomos and Narrative*, *supra* note 1, at 27 (citing and quoting the Mennonite Bob Jones Brief, *supra* note 26). Counsel for the Mennonites explained, his client "preferred to make its position known to this Honorable Court in its own words. Counsel, in filing this brief, therefore presents verbatim" its views. *Id.* at 1. The opening "dagger" footnote of the Supreme Court's decision in *Bob Jones* does not refer to this filing. See 461 U.S. at 576, † at 5.

28. Mennonite Bob Jones Brief, *supra* note 26, at 3-4 (quoted in greater length in Cover, *Nomos and Narrative*, *supra* note 1, at 27).

29. Cover, *Nomos and Narrative*, *supra* note 1, at 27, quoting the Mennonite Bob Jones Brief, *supra* note 26, at 4. The emphasis was added by Cover. See also Amish Bob Jones Brief, *supra* note

As the long list of amici briefs filed in the Supreme Court evidences,³⁰ *Bob Jones University v. United States* and its companion case, *Goldsboro Christian Schools v. United States*,³¹ were part of a struggle over racial discrimination in public and private schools, clubs, and places of accommodation. That conflict entailed not only repeated actions by and against the Internal Revenue Service related to the tax-exempt status of schools that maintained racial divides, but also legislative efforts in

26, at 4 (arguing that religious bodies ought not to be forced to comply with secular government's understandings of "public policy" and that the specter of such obligations "rightly raises in the Amish mind memories of decrees of many another sovereign, in their long and difficult history, seeking to force, under penalty, conformity to the will of the state."). The COLPA Brief, also in support of Bob Jones, ended by quoting Emily Dickinson.

Much Sense—the Starkest Madness—
 'T is the Majority.
 In this, as All, prevails—
 Assent—and you are sane—
 Demur—you're straightway dangerous—
 And handled with a Chain—

COLPA Bob Jones Brief, *supra* note 26, at 20.

30. Filings on behalf of the position that the IRS had acted properly to end the exemption were more numerous and included briefs from the American Civil Liberties Union and the American Jewish Committee (136 LANDMARK, *supra* note 12, at 214-87), the Lawyers Committee for Civil Rights under Law (136 LANDMARK, *supra* note 12, at 453-90), the NAACP et al. (136 LANDMARK, *supra* note 12, at 491-569), the NAACP Legal Defense and Education Fund, Inc. (136 LANDMARK, *supra* note 12, at 570-636), the National Association of Independent Schools, (136 LANDMARK, *supra* note 12, at 666-80), the Independent Sector (136 LANDMARK, *supra* note 12, at 425-452), the North Carolina Association of Black Lawyers (136 LANDMARK, *supra* note 12, at 673-91), and William T. Coleman, Jr., who had been "invited by the Court" to file a brief. See Brief of Amicus Curiae In Support of the Judgments Below, filed by William T. Coleman, Jr., invited by Order of April 19, 1982. 136 LANDMARK, *supra* note 12, at 327-414 [hereinafter Coleman Bob Jones Amicus Brief]. That order can be found at *Goldboro Christian Schools Inc. v. United States*, 456 U.S. 922 (1982) (asking Coleman "to brief and argue cases as amicus curiae in support of the judgment below"). His role is discussed *infra*, notes 116-19, 122 and accompanying text.

Also arguing that the IRS had properly exercised its discretion to withdraw the tax-exempt status of Bob Jones University, but not included in the LANDMARK Compilation, were the Anti-Defamation League of B'Nai B'rith, the International Human Rights Law Group, and Lawrence E. Levy. See Motion for Leave to File Brief and Brief of the Anti-Defamation League of B'Nai B'rith, as Amicus Curiae, 461 U.S. 574 (1983) (Nos. 81-1 & 81-3); Motion for Leave to File Brief Amicus Curiae, and Brief of the International Human Rights Law Group, 461 U.S. 574 (1983) (Nos. 81-1 & 81-3); Motion for Leave to File Brief Amicus Curiae, and Brief of Lawrence E. Levy on behalf of affirmance of the decisions below, 461 U.S. 574 (1983) (Nos. 81-1 & 81-3).

In addition, after the Government changed its position and asked the Court to vacate the lower court decisions upholding the IRS withdrawal of tax exempt status, Laurence H. Tribe and Bernard Wolfman filed, on behalf of "teachers, scholars, and students of constitutional law and tax law," an amici curiae brief in both the *Bob Jones* litigation and the companion case of *Goldsboro Christian Schools, Inc. v. United States*. The Tribe/Wolfman brief opposed the government's request and argued that the case was not moot. See Motion for Leave to File Brief Amici Curiae, and Brief of Laurence H. Tribe and Bernard Wolfman as Amici Curiae with Respect to Respondent's Motion to Vacate, 461 U.S. 574 (1983) (Nos. 81-1 & 81-3) [hereinafter Tribe/Wolfman Bob Jones Brief]. A similar position was taken by the United Church of Christ, explaining that it had not taken a position earlier because it had "expected that its views would be adequately represented by the Solicitor General." Motion of Agencies of the United Church of Christ for Leave to File Brief Amicus Curiae on Questions of Mootness and Standing at 3, 461 U.S. 574 (1983) (Nos. 81-1 & 81-3), *reprinted in* 136 LANDMARK, *supra* note 12, at 692, 695 [hereinafter the United Church of Christ Bob Jones Mootness Filing].

31. See *Bob Jones Univ. v. United States*, 468 F. Supp. 890 (D.S.C. 1978), *rev'd*, 639 F.2d 146 (4th Cir. 1980), *aff'd*, 461 US. 574 (1983); *Goldboro Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd*, 644 F.2d 879 (4th Cir. 1981) (unpublished/table notation).

Congress, several lawsuits, and changes in the positions taken on behalf of the United States Government as the administrations switched from Presidents Nixon to Ford to Carter to Reagan.³² The proponents of a rule that tax exemptions ought not to be provided to segregated schools run by religious groups included (at times) the United States Government and (more consistently) the NAACP, the ACLU, and several religiously-affiliated organizations. Their opponents, in addition to Bob Jones University and Goldsboro Christian Schools, were other religious organizations, many of which distanced themselves from the scriptural interpretation proffered by Bob Jones but argued for a First Amendment right to hold such a view.³³

Cover's innovations in discussing this conflict are several. First, rather than posit the legal commitments of normative communities as impermissibly disruptive of the congenial order of the nation-state, Cover identified the state as the aggressive force, *jurispathic* in its ability to quash such communities' own commitments when they are at odds with national norms.³⁴ More than that: when successful, the "coercive dimension of law" of the state destroys the plausibility that the competing interpretation is a form of legitimate legal interpretation.³⁵ In other words, now that secular rule against racial segregation (itself not yet sixty years old in the United States) is pervasive, it has so much force as to make one skeptical that Bob Jones's scriptural claim of a divine obligation to segregate could have been anything other than an insincere effort to avoid federal law. Secular law obliterates the stature of the other claim as "law."

Second, Cover insisted that the enactment of law by community practices is in fact "law," rather than just "customs" or "practices." Those terms have, in American legal parlance, gained an anthropological gloss that make them less than true peers of the "real" law, assumed to consist only of positive enactments such as statutes and constitutions or

32. Some of the various IRS positions and legislative efforts between 1971 and 1982 are described in the amicus filing by Congressman Lott. See Lott Bob Jones Amicus Filing, *supra* note 26, at 2-6.

33. See, e.g., Baptist/Presbyterian Bob Jones Brief, *supra* note 26, at 1, 136 LANDMARK, *supra* note 12, at 293 (disagreeing with Bob Jones University's leaders on their reading of scriptures and believing their policies and beliefs to be "racist," but supporting that University because sincere religious beliefs should be protected by the First Amendment); Mennonite Bob Jones Brief, *supra* note 26, at (1) of the Statement of the Interests of the Amicus (describing the Mennonite Church's work in "support of victims of oppression and bigotry whether the opposition is motivated by class, racial, or religious beliefs," its opposition to "racial discrimination of any kind," and its disagreement with Bob Jones University that the Scriptures forbid interracial dating). The Brief of the National Association of Evangelicals, *supra* note 26, at 2, 136 LANDMARK at 642, stated that "[m]ost evangelicals would not agree with the view of Bob Jones University that interracial dating and marriage is contrary to Scripture." COLPA's brief, *supra* note 26, at 1, struck a similar note, "wishing to make clear that it strongly disapproves and condemns the racial practices" of Bob Jones and of Goldsboro Christian Schools, and that such were contrary to "Jewish religious principles."

34. Cover, *Nomos and Narrative*, *supra* note 1, at 40.

35. *Id.* at 48.

pronouncements from government officials such as judges.³⁶

Third, for Cover it was the state's fear of the *jurispotence*³⁷ of normative communities that needed to be explained and justified. He wanted the state's actors (here, its judges and, derivatively, commentators on their work) to be uncomfortable in their knowledge of their own power, respectful of the legitimacy of competing legal systems, and aware of the possibility that multiple meanings and divergent practices ought sometimes to be tolerated, even if painfully so.

But identifying the state's jurispthic authority did not result in Cover's rejection of the exercise of that power. Rather, Cover produced the very justification that he insisted was required when state law imposed itself upon paideic community practices. Cover explained the utility of an "imperial mode,"³⁸ sometimes properly imposing its singularity. As he described, when judges kill law by asserting that "*this one* is the law and destroy or try to destroy the rest," judges both do violence and enable peace.³⁹ Too much law is too chaotic to sustain and some laws—even if legitimately generated by such communities—are noxious. In Cover's words, it is judges' "regulative function that permits a life of law rather than violence."⁴⁰ As he put it, it is the "work of courts, which commonly inhibit—but occasionally foster—the processes of creating legal meaning."⁴¹

The imposition of imperial law ought not, however, be done innocently, unaware of its impact on other forms of law and therefore disrespectful of the validity of those other sources of lawmaking.⁴² Nor ought it hide behind the guise that its function is to impose clarity, given the uncertain (but implicitly unitary) nature of law. Rather, the "jurispthic function of courts" should entail a frank acknowledgement of its purpose: to constrain too much law emanating from divergent sources. Further, judges (and commentators) ought to recognize that the authority to impose a single hermeneutic stems from power itself rather than adopt a more comfortable

36. In countries with a more robust commitment to common law—that may be in part an artifact of the absence of a written constitution—customary practices may not be understood as so obviously secondary to other legal sources.

37. *Nomos and Narrative*, *supra* note 1, at 15. Unlike Cover's terms "jurisgenerative" and "jurispthic," this word is less frequently cited. A quick check of Westlaw located discussions of Cover and the terms "jurisgenerative" and "jurispthic" in more than 145 instances, whereas the search for Cover and "jurispotence" found the term "jurispotence" cited in only three articles. See Perry Dane, *The Public, The Private, and the Sacred: Variations on a Theme of Nomos and Narrative*, 8 CARDOZO STUD. L. & LIT. 15, 18 (1996); Susan B. Koniak, *When Law Risks Madness*, 8 CARDOZO STUD. L. & LIT. 65, 114, n.81 (1996); Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law*, 40 WM. & MARY L. REV. 1623, 1632 (1999).

38. Cover, *Nomos and Narrative*, *supra* note 1, at 14.

39. *Id.* at 53.

40. *Id.*

41. *Id.* at 26.

42. See, e.g., Cover's discussion, *id.* at 44 (describing state law that "shuts down the creative hermeneutic of principle that is spread" through and by communities).

(but false) proposition that a legal regime triumphs because it is superior.⁴³

Thus, unlike Robert Post, who reads Robert Cover as turning “quite palpably away from the state”⁴⁴ when he focused on the violence done in the name of court orders,⁴⁵ I read Cover as endlessly fascinated with the interactions between the state and paideic communities—and with the potential for such interactions themselves to be jurisgenerative moments. Cover did not forsake courts, but rather (and disquietingly for many within the academy) refused to privilege judges’ readings.⁴⁶ He was, instead, “asserting that within the domain of constitutional meaning, the understanding of [religious groups such as] the Mennonites assumes a status equal (or superior) to that accorded to the understanding of the Justices of the Supreme Court.”⁴⁷

Below, I explain this reading of Cover, thereby detailing why I think that Post misconceives Cover’s project. I then take up a different argument: why, within Cover’s own terms, the decision in the *Bob Jones* case is not—as Cover posited—a failure of engagement. Instead, I believe that the imposition on Bob Jones University of national nondiscrimination norms ought, within Cover’s lexicon, to be identified as exemplary of what Cover hoped might be produced when the law of the state takes seriously the lawmaking of communities of faith.

What is instructive about the full exploration of the conflict about Bob Jones is that it produced more than a decade of contestation inside the United States government about what its own anti-racist norms entailed. That occasion for conflict within and between the nation-state and paideic community eventually produced the revelation of each legal regime’s commitments. By the time the case reached the Supreme Court, anti-segregationist premises—that is to say, rejection of explicit racial segregation—had already become an embedded and unself-conscious

43. *Id.* at 42 (“Modern apologists for the jurispathic function of courts usually state the problem not as one of *too much* law, but as one of *unclear* law.”) (emphasis in the original). Here, Cover directly disagrees with Owen Fiss’s formulation. See Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). The stance taken by Fiss was characterized by Cover as “too easy” because it assumed the virtue of the federal judiciary. Cover argued that the “challenge presented by the absence of a single, ‘objective’ interpretation is, instead, the need to maintain a sense of legal meaning despite the destruction of any pretense of superiority of one *nomos* over another.” *Nomos and Narrative*, *supra* note 1, at 44.

44. Robert C. Post, *Who’s Afraid of Jurispathic Courts?: Violence and Public Reason in Nomos and Narrative*, 17 YALE J.L. & HUMAN. 9, 11 (2005) [hereinafter Post, *Jurispathic Courts*].

45. Post also relies on another essay by Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). See discussion *infra* note 55 and accompanying text on my differing view of that essay.

46. Cover, *Nomos and Narrative*, *supra* note 1, at 57, n.158 (“I accord no privileged character to the work of the judges. I would have judges act on the basis of a committed constitutionalism in a world in which each of many communities acts out of its own *nomos* and is prepared to resist the work of the judges in many instances.”).

47. *Id.* at 28-29 (describing the Mennonite community as creating “law as fully as does the judge,” and living by their “proclaimed understanding” that sometimes required migration to continue to live by their beliefs).

facet of American “truth.” The moment for frank acknowledgement of American law’s jurispactic powers had passed because the particular form of racism embraced by Bob Jones University had already become implausible.

Other forms were, however, more resilient. As Cover discussed at the time,⁴⁸ the debate about the legality of informal self-segregation was well underway. Moreover, legal toleration of self-segregation was emerging as the Supreme Court upheld practices such as tax deductions given by states for payments for private education.⁴⁹

After offering this alternative reading of *Bob Jones*, I conclude by taking up an issue that Cover did not: conflict *within* paideic communities about their own practices and authoritative interpretations. I return to the practice of veiling, as well as address the question of federal toleration of patrilineal membership rules, as I argue that today’s central conflicts involve contestation from within. This aspect is often obscured as debates are posited to exist between a homogenous self (such as “the United States” or “the West”) and an undifferentiated other (be it “Indian tribes,” “Islam,” or “the veil”). Twenty-five years after *Nomos and Narrative*, our central issues are whose voices within paideic communities are heard by which speakers of the secular order’s power.

II. LEARNING FROM PAIDEIC COMMUNITIES

In *Nomos and Narrative*, Cover called law “a resource in signification that enables us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate, or dignify.”⁵⁰ Cover wanted us to understand that the law of the state—and especially that pronounced by judges—was only one of many sets of laws. Moreover, Cover insisted that the law of the state was in some sense less potent and less compelling than that generated through certain kinds of communities, which demand that law lace life—that law compel individuals in small and large fashion—by specifying a host of daily actions that at times diverge from the behaviors of non-members.

Nomos and Narrative focuses on religious communities, including Mennonite, Amish, Jewish, and Evangelical Christian groups, all of which Cover found attractive because their laws have the strength of being forged through practice. As Cover noted, his was not a distinction between law in practice and law on the books.⁵¹ Rather, his focus was on law *as* practice itself or, more accurately, laws as practices themselves. The plural is relevant for it is through the thickness and the compulsion of

48. See *infra* notes 89, 162, 165 and accompanying text.

49. *Mueller v. Allen*, 463 U.S. 388 (1983), discussed *infra* note 163 and accompanying text.

50. Cover, *Nomos and Narrative*, *supra* note 1, at 8 (footnotes omitted).

51. *Id.* at 7.

daily activities that communities' laws gain their strength.⁵² As Cover explained, the discourses of lawmaking in such communities are multifaceted: "initiatory, celebratory, expressive, and performative."⁵³ Further, those discourses often do not sound in the "critical and analytic" tone common in the American legal academy.⁵⁴

Cover not only wanted us to realize that these communities are sources of law, jurisgenerative as he (and now we) label them. He insisted that laws thus made are stronger in the sense of having a palpable power that can often exceed the kind of strength exhibited by judge-made law. The concept of performance is key: in general, judges pronounce the meaning of law but do not have to enact those meanings by themselves engaging in the activity that they require—by living the law that they make.

These different forms of being a person "of" law (that is, a judge in a nation-state as contrasted with a member of a paideic community) is further explained by Cover in another essay, *Violence and the Word*.⁵⁵ There, entering a conversation among theorists about interpretation as a practice common to both the disciplines of law and of literature,⁵⁶ Cover objected to the too-ready equation of the two forms of interpretation.⁵⁷ While both law and literature deal with the meaning of words, law—unlike literature—intrinsically entails a kind of violence. Cover used the word "violence" to force the uncomfortable acknowledgement that judicial lawmaking uses the power of the state to disrupt actual lives.

Yet violence occasioned by judicial order is a peculiar and constrained

52. As Cover explained, his focus was on laws developed through worlds made of practices that were repetitive, obliged, insistent, and continuing. His examples included Jewish obligations of daily worship that (if male) are required to be constant. See Cover, *Nomos and Narrative*, *supra* note 1, at 12 (discussing the interaction among "Torah, worship, and deeds of kindness").

53. *Id.* at 13.

54. *Id.* On rare occasions, members of the judiciary do link their lawmaking to passionate engagement. See, e.g., William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 42 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 948 (1987). See also Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney*, 57 GEO. WASH. L. REV. 1513 (1989) (calling for judicial engagement to impose obligations upon government for personal wellbeing).

Justice Brennan's lecture discussed his famous decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970), which had mandated procedural due process prior to the termination of an individual's welfare benefits. Brennan stated that the decision demonstrated that the Due Process Clause was "not simply the blueprint for an empire of reason" but also responsive to the concern that bureaucratic decisionmaking lacked a "dimension of passion, of empathy, necessary for a full understanding of the human beings affected by those procedures." Brennan, *Reason, Passion*, at 973. That stance was one that Owen Fiss found disquieting. See Owen Fiss, *The Other Goldberg*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 229 (Michael J. Meyer & William A. Parent eds., 1992). There, Fiss described Brennan's introduction of a "new element into the decisional process: passion," and objected to it. *Id.* at 235, 239-43.

55. Cover, *Violence and the Word*, *supra* note 45.

56. See, e.g., Fiss, *Objectivity and Interpretation*, *supra* note 43; Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984). See generally, Symposium, *Interpretation Methodologies from Other Disciplines*, 58 S. CAL. L. REV. 1 (1985).

57. Cover, *Nomos and Narrative*, *supra* note 1, at 49 (legal meaning cannot take place "without the committed action that distinguishes law from literature").

form. Although judges make rulings that reallocate personal property, limit individual freedoms, and even contribute to ending lives, judges do not themselves carry out the orders that they issue. Therefore, judges rarely are put to the kinds of tests endured by members of communities of faith. Judges generally do not experience, let alone have to suffer on account of, their own interpretations of law. Unlike the Mennonites, the Amish, certain sets of Jews, and others, federal judges (as judges) do not live in the “integrated world of obligation and nomos.”⁵⁸

But rather than seeing that difference as an irreparable fault of state legal regimes, Cover understood its utility. The awesome power of state lawmaking is cabined (properly from Cover’s vantage point) because judges must depend on others to implement that which they insist law requires. Law, state-made, takes time and a range of people to transform its injunctions into enforceable regimes.⁵⁹ Because a chain of actors is needed to turn court law into action, the potential for non-implementation arises. In this cumbersome structure, space exists for refusal and reinterpretation. The state’s imperial judge-made law thus comes with a cushion, and the unwieldy enterprise of turning law into practice imposes a useful constraint, even if (or precisely because) it sometimes makes the state’s law less effective.

One more distinction between the law of paideic communities and that of the nation-state needs to be underscored. Cover’s examples of communities of commitment included many that were centuries old, small (actually tiny) in number, and yet sustained remarkably distinct legal regimes across time, place, and enormous changes in the politics and economies of the countries in which they lived. Cover insisted that such communities were instructive because they showed that the creation of *enduring* legal meaning required action, not just words. As Cover detailed, the Mennonites did not just pronounce law, they exemplified what he called “living their law.”⁶⁰ Their commitment to their own obligations was such that, when host nations attempted to dislodge them, they were put to the test of dislocation: they were required either to reaffirm or to abandon a set of core beliefs and, if reaffirming, either to suffer persecution or to migrate.

In contrast, for much of the United States’ history, many judges (and many citizens) have been able to state their understanding of law without facing tests of their commitment to the principles they elaborated.⁶¹ Cover

58. *Id.* at 31.

59. A distinct question is the degree to which judges remain identifiably responsible for their actions. See Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983).

60. Cover, *Nomos and Narrative*, *supra* note 1, at 49.

61. Obvious exceptions exist. The hostility encountered by judges tasked with ordering desegregation of southern schools has been carefully chronicled. See JACK BASS, UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE

thus identified the potential thinness of those commitments. As he cautioned, “[t]he universalist virtues that we have come to identify with modern liberalism, the broad principles of our law, are essentially system-maintaining ‘weak’ forces.”⁶² Contemporary evidence for his proposition can readily be found in the juxtaposition of American ideals of liberty and a series of memoranda in 2002 from the Department of Justice explaining the legality of torture and of detention without rights.⁶³

The relative disengagement of the state’s judges did not, however, make Cover uninterested in its law for he understood that its antiseptic character enabled judges to impose a singularity that, upon occasion, was demanded to maintain order.⁶⁴ The questions for Cover were not *if* or *whether* the state should sometimes exert its will, but rather *when* and *how* to do so. As he put it, the “challenge presented by the absence of a single, ‘objective’ interpretation is . . . the need to maintain a sense of legal meaning despite the destruction of any pretense of superiority of one nomos over another.”⁶⁵

Moreover, Cover was attracted—in *Nomos and Narrative* and in other writings—to the interaction among many communities’ legal systems that had varying degrees of insularity. For him, competition and complementation among legal systems could itself be generative, as Cover argued in two other articles, one (co-authored with Alexander Aleinikoff) including the term “dialectical federalism” in its title⁶⁶ and the other using the phrase “jurisdictional redundancy.”⁶⁷ In both essays, Cover addressed

SUPREME COURT’S *BROWN* DECISION INTO A REVOLUTION FOR EQUALITY (1981). More recent examples include William Wayne Justice (a federal district court judge who upheld the rights of prisoners in Texas and was faced with social ostracism and threats against him) and Margaret Marshall (who, as Chief Justice of the Supreme Court of Massachusetts, occasioned hostility for pronouncing the rights of gays to marry). See David Maraniss, *Justice, Texas Style: A Populist Judge, Shaking up the State from his Courtroom in Tyler*, WASH. POST, Feb. 28, 1987, at G1 (describing the hostility toward Judge Justice, once called “the most hated man in Texas”); Emily Bazelon, *The Woman Behind Gay Marriage*, LEGAL AFFAIRS May/June 2004, at 39-41 (discussing the attacks on Chief Justice Margaret Marshall, including the chanting of “Hey hey, ho, ho, Margaret Marshall has got to go” outside the Court and the “collision course” with the legislature that emerged in the wake of the ruling finding a state constitutional right to marry persons of the same sex).

62. Cover, *Nomos and Narrative*, *supra* note 1, at 12.

63. See, e.g., Memorandum of Aug. 1, 2002 from Jay S. Bybee Assistant Attorney General, Office of Legal Counsel, for Alberto R. Gonzales, Counsel to the President, re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, available at <http://www.washingtonpost.com/wp-srv.nation/documents/dojinterrogationmemo20020801.pdf> (last visited March 24, 2005), rescinded by Memorandum of December 30, 2004 from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, for James B. Comey, Deputy Attorney General, Regarding Legal Standards Applicable under 18 U.S.C. §§ 2340-2340A, available at <http://www.justice.gov/olc/dagmemo.pdf> (last visited March 9, 2005); Sanford Levinson, *Contemplating Torture: An Introduction*, in TORTURE 23 (Sanford Levinson ed., 2004).

64. Cover, *Nomos and Narrative*, *supra* note 1, at 44, 53.

65. *Id.* at 44.

66. Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

67. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

the layered federalism of the United States. He argued that when the legal systems of the United States and individual states were sufficiently distinct, a confluence of norms could provide evidence of a thicker commitment to a particular understanding of a given precept. Where divergence existed, conflict required one or the other legal regime to give way, which in turn imposed the obligation that legal actors recommit to a particular rule or reconfigure its parameters.

For me, that interplay is repeatedly evidenced in judicial exchanges about the degree to which federally-recognized Indian tribes are autonomous in the United States' law.⁶⁸ In some instances, the Supreme Court has insisted that tribes have considerable freedom to govern themselves and, occasionally, nonmembers as well. One decision, for example, refused a woman's challenge to a tribe's patrilineal membership rules which governed enrollment as an Indian and hence access to receipt of federal benefits available for tribal members.⁶⁹ In contrast, the Court has been much less respectful of tribal autonomy in other contexts. The Court has held that tribes have no ability to prosecute "non-Indians" who commit minor offenses on tribal lands,⁷⁰ to exercise civil jurisdiction over tribal members' claims of wrongful searches and seizures on tribal lands by state officials,⁷¹ or to control the zoning of land held by non-Indians within a tribe's borders.⁷² When the Supreme Court accedes to or refuses tribal claims of self-governance, it gives evidence of how deeply ingrained are certain federal precepts from which deviance will not be tolerated.

Through exchanges such as these, judges' commitments are tested, and through their rulings, state lawmaking delineates which variations from its norms are tolerable. As Cover later explained (in an exchange with Owen Fiss that we reproduced in the 1988 publication of the casebook, *Procedure*, co-authored by the three of us):

Nomos is fundamentally a piece about the necessary disjuncture between the range of state violence and the range of legal meaning;... [T]he article in no way holds up insular religious communities as a model for law reform. It holds them as *clear* examples of divergent understandings of legal meaning; it treats them as unambiguous instances of the unshared, nonconsensual dimensions of legal understanding within the American Empire. . . .

68. See Judith Resnik, *Applying the Myths and Methods of Marbury v. Madison to Tribal Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77 (2004); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

69. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), discussed *infra* notes 176-89 and accompanying text.

70. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

71. Nevada v. Hicks, 533 U.S. 353 (2001).

72. Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 430 (1989).

I am insistent that the apparent capacity of the courts to fashion a life of shared meaning is always seriously compromised and often destroyed by the violence which is the implicit or explicit threat against those who do not share the judge's understandings. I, like Owen [Fiss], celebrate the achievements of federal courts in destroying apartheid in America. Like Owen, I favor federal courts taking a lead in reforming institutions when the other officials fail. But it is Fiss not Cover who is the romantic here. It is Fiss who supposes that those achievements emerge out of a shaped community of interpretation that is national in character. I support those efforts because I believe them right and justified, because I am sufficiently committed to join with others in imposing our will on those who disagree. At times the federal courts have been our allies in those commitments. There is every reason to believe that such a convergence of interests was temporary and accidental; that it is already changing and will soon be a romantic memory of the sublime sixties.⁷³

These comments were written in the middle of the 1980s. Read in 2005, Cover's description of the "temporary" convergence of progressive efforts to deepen equality and the attitudes of federal judges is all too prescient, as is his reference to "the American Empire." But, as I detail below, while coolly appraising the state's limitations, Cover also wished for more from the state. In *Nomos and Narrative*, Cover revealed that even as he refused to privilege judges' interpretations, he thought that through conflicts such as those engendered by challenges from paideic communities, generative lawmaking could emerge.

III. COVERIAN ASPIRATIONS FOR THE STATE'S JUDGES

Cover was consistently interested in instances of civil disobedience because they put all the participants to the test of their understanding of legal obligation. In the 1970s, he wrote *Justice Accused*, which examined judicial enforcement of slavery in the pre-Civil War era.⁷⁴ In 1985, Cover published *Folktales of Jurisdiction*,⁷⁵ an essay that used a sequence of confrontations between judges and kings (such as the encounter between Lord Coke and King James) to explore the complex authority of the judge, empowered by the state yet sometimes obliged to sit in judgment of the state. In *Nomos and Narrative*, Cover returned to some of these

73. ROBERT M. COVER, OWEN M. FISS, & JUDITH RESNIK, PROCEDURE 729-730 (1988); also reprinted in OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE 482 (2003).

74. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

75. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179 (1985).

instances⁷⁶ and added the example of Bob Jones University's insistence on racial segregation.

His examples thus vary in terms of the actors in focus (sometimes state-empowered jurists, sometimes kings, sometimes insular communities) and the attractiveness or toxicity (from the perspective of liberal secularism) of the principle espoused by the deviant legal actor. Among these actors, judges were specially situated for they had either to "affirm interpretation of the law through violence against protestors or permit polynomia of legal meaning."⁷⁷ As Cover argued, law review writing does not force such interaction. Protest does.⁷⁸

While *Nomos and Narrative* offered several criticisms of judges, it can fairly be read to show that Cover also harbored a hope that, by contesting meaning through practices oppositional to the nation-state, community protests would bring such movements into courts. Pressed to choose among competing legal regimes, judges have to rethink and recommit themselves to their own understandings of foundational legal obligations. Through such contestation, judges have to take some heat, either to shape interpretations of the nation-state's law that permit competing nomoi to live their visions of obligation or to decide that the particular conflict requires a singular commitment and conflicting legal regimes must be squelched. (Whether the imposition of the nation's law will result in extinguishing such practices can not be clear at the initial phase of conflict but would become known over time.) In that interaction, judges come into close contact with those living their legal beliefs. Specific examples of a willingness to disobey the state's laws push judges into either using the state's power to eradicate the protestors' beliefs or shifting the state's law to tolerate those contrarian practices.

And, state actors are not the only ones challenged through conflict. As

76. Cover, *Nomos and Narrative*, *supra* note 1, at 42-43, 58-59 (describing the interaction between Justice Edward Coke and King James).

77. *Id.* at 47-48.

78. The symposium from which these papers emerged was held on April 25, 2004, the day on which thousands marched in Washington, D.C. in an effort to preserve the rights of women to choose if and when to have children. See March for Women's Lives, *available at* <http://www.marchforwomen.org/content/index.php?pip=14&PHPSESSID=c4c4fbc206aa94> (last visited Apr. 4, 2005). Hence those of us who participated in the symposium, but would otherwise have gone to march, reminded ourselves that Robert Cover often left the academy to support change by direct participation. Cover was active in many movements, including an effort to have Yale divest itself of South African investments when that country was under an apartheid regime. Cover supported the construction of a symbolic Shanty on the plaza of the Beinecke Library and as a result was charged with overseeing the use of that plaza. That job meant he not only decided that the Shanty could stay but also had the work of daily oversight about what other protests, celebrations, or activities could take place in that space. The photograph of Cover, reproduced on the cover of this volume and which hangs in a Yale Law School seminar room dedicated to him by the Class of 1986, shows him on the campus with a group of students at a teach-in related to protests against Yale's holdings of investments in South Africa. See Dirk Johnson, *Apartheid and Yale: A Week of Protest*, N.Y. TIMES, Apr. 19, 1986, at L29. The photograph printed with that article in the *New York Times* and the one used here are different shots of that scene.

Cover explained, “the state influences interpretation: for better or worse, most communities will avoid outright conflict with a judge’s interpretations, at least when he will be likely to back them with violence.”⁷⁹ Through the exchange when the community insists on the lawfulness of its practices and the state responds, both the community and the state are tested. The stakes for insular communities to live their laws change as the state or other powerful actors object. In that confrontation, one side has to blink—either the state or the paideic community—and in that pushing or backing off, some adaptation meriting the label “jurisgenerative” might well occur.⁸⁰

What annoyed Cover was jurists’ use of devices of jurisdiction to deflect the need to rule on the merits of the conflicts. In *Nomos and Narrative*, Cover criticized several Supreme Court decisions for relying on issues of jurisdiction in lieu of acknowledging conflict and facing its implications. For example, Cover criticized the Supreme Court’s decision in *Walker v. City of Birmingham*, involving civil rights protestors who marched in Birmingham, Alabama rather than obey what appeared to be a facially illegal injunction restraining them from doing so.⁸¹ The Court’s response—that one must obey an illegal provision in order to contest it—enabled the justices to avoid endorsing or condemning the propriety of the act of disobedience.⁸²

According to Cover, the Court “ultimately responsible for the interpretation” did not “commit itself separately to the proposition that the particular interpretation warrants violence.”⁸³ That posture made “public order” the “predicate to creation of legal meaning,”⁸⁴ whereas Cover argued that public *disorder* was an important element in the creation of legal meaning. Similarly, Cover objected to decisions that deferred to the authority of police or other state officials by creating jurisdictional doctrines⁸⁵ designed to avoid “courts from ever reaching the threatening questions.”⁸⁶ Through such decisions, jurists were “ferreting out

79. Cover, *Nomos and Narrative*, *supra* note 1, at 53.

80. *Id.* at 53.

81. 388 U.S. 307 (1967), discussed in Cover, *Nomos and Narrative*, *supra* note 1, at 55-56. Cover’s disapproval of the case was shared by Owen Fiss, who has written movingly about it. See Owen Fiss, *The Civilizing Hand of the Law? Birmingham, 1963*, 89 YALE REV. 1, 6-9 (2001). Fiss described the application by the Southern Christian Leadership Congress for applications in April of 1963 to march, the denial, and Dr. Martin Luther King’s decision to march on Good Friday, followed by his imprisonment and his penning of the “famed ‘Letter from a Birmingham Jail.’” As Fiss explained, the opinion came in 1967, four years after the march and after waves of violent rather than peaceful protest, and as the Court’s agenda had begun to shift from “dismantling Jim Crow to maintaining law and order.” *Id.* at 19.

82. *Walker v. City of Birmingham*, 388 U.S. at 320-21.

83. Cover, *Nomos and Narrative*, *supra* note 1, at 55.

84. *Id.*

85. *Id.* at 56. Cover cited as examples *Los Angeles v. Lyons*, 461 U.S. 95 (1983), *Rizzo v. Goode*, 423 U.S. 362 (1976), and *Younger v. Harris*, 401 U.S. 37 (1971).

86. Cover, *Nomos and Narrative*, *supra* note 1, at 56.

jurisdictional excuses to avoid disrupting the orderly deployment of state power and privilege.”⁸⁷

Cover focused on the 1983 Supreme Court decision in the case of *Bob Jones University v. the United States*⁸⁸ as one of his central examples of this form of judicial avoidance.⁸⁹ As Chief Justice Warren Burger, who wrote the majority opinion in the 1983 Supreme Court decision explained, Bob Jones University was “dedicated to the teaching and propagation of the fundamentalist Christian religious beliefs. . . . The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage. To effectuate those views, Negroes were completely excluded until 1971.”⁹⁰

In the years thereafter, the University accepted applications only from “Negroes married within their race.”⁹¹ In 1976, after the Supreme Court ruled that racial exclusion from private schools was unconstitutional,⁹² the University changed its policy to permit “unmarried Negroes to enroll; but a disciplinary rule prohibit[ed] interracial dating and marriage.”⁹³

Bob Jones University was categorized under United States tax law as a “charitable” institution and therefore its income was specially sheltered from taxation. Prior to 1970, the Internal Revenue Service gave such tax exemptions “to all private schools, regardless of racial policy.”⁹⁴ In 1970, after the Internal Revenue Service (IRS) was itself sued,⁹⁵ the IRS withdrew the tax-exempt status of the University. In 1971, in a per curiam decision, the Supreme Court affirmed a three-judge court ruling that the IRS could not give tax exemptions to Mississippi public or private schools that did not maintain a policy of nondiscrimination.⁹⁶

87. *Id.* at 67.

88. 461 U.S. 574 (1983).

89. Cover, *Nomos and Narrative*, *supra* note 1, at 25-33, 62-68. In an op-ed written shortly after the Supreme Court’s decision, Cover had been more supportive of its ruling but critical of another decision, *Mueller v. Allen*, 463 U.S. 388 (1983), upholding a tuition tax deduction given by Minnesota for private schools. See Robert M. Cover, *Court Has High Aim, Bad Plan on Bias*, N.Y. TIMES, Jul. 11, 1983, at A15. Cover described the *Bob Jones* decision as:

[F]ull of the language of equality. . . . And while the practical implications of the Bob Jones decision are not great (honest and sincere religious commitment to racial discrimination is not all that common), the extension of a public subsidy to such practices through the tax code would have been a dangerous signal conferring respectability and moral legitimacy on positions quite properly considered abhorrent—to be tolerated in a spirit of liberty but emphatically not to be encouraged.

Id. See also *infra* notes 162-65 and accompanying text.

90. *Bob Jones Univ.*, 461 U.S. at 580.

91. *Id.*

92. *McCrary v. Runyon*, 515 U.S. 160 (1976).

93. *Bob Jones Univ.*, 461 U.S. at 580.

94. *Bob Jones Univ. v. United States*, 639 F.2d 147, 150 (4th Cir. 1980).

95. See *Green v. Kennedy*, 308 F. Supp. 1127 (D.D.C. 1970) (granting, at the request of black parents in Mississippi, a preliminary injunction prohibiting the IRS from according a tax exempt status to private schools in Mississippi that practiced racial discrimination).

96. *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff’d sub nom* *Coit v. Green*, 404 U.S.

Thereafter the Service issued several rulings to implement the policy,⁹⁷ including revocation of the tax-exempt status of Bob Jones. Bob Jones University responded with a lawsuit seeking to enjoin the revocation, but the Supreme Court held that such an affirmative action was barred by anti-injunction provisions of the Tax Code.⁹⁸ However, the Court noted the availability of an alternative to raise the issue,⁹⁹ which Bob Jones followed—bringing a new action to recover twenty-one dollars it claimed to have overpaid on unemployment tax. The Government responded by counterclaiming that an additional \$489,675.59 was due.¹⁰⁰ The Fourth Circuit upheld the IRS action. The issue on which Bob Jones sought Supreme Court review in 1982 was whether “private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine, qualify as tax exempt organizations under” the Tax Code.¹⁰¹

But because of a change in the Oval Office, the posture of the case before the Court was not straightforward. Some of the IRS decisionmaking had occurred while Jimmy Carter was the President. In 1980, Ronald Reagan assumed the Presidency. Between 1981 and the oral argument of the case in October of 1982, the Reagan Administration took a number of different tacks, some of them unusual.

Specifically, in September of 1981, when initially responding to Bob Jones University’s petition for certiorari challenging the Fourth Circuit’s decision in favor of the IRS, the United States Government urged the Court to take the case and to affirm. The Government stated that the IRS had “acted within its statutory authority” when revoking the tax-exempt status of Bob Jones and that the application of this “nondiscrimination principle” did not violate the religious rights of the University.¹⁰² Accordingly, argued the Government, the Fourth Circuit was correct on the merits and, ordinarily, the Government would not have called for the Court to rule.

As the Government’s first brief explained, however, a problem remained. Various church-related schools were not complying with

997 (1971) (*per curiam*).

97. See Rev. Rule 71-447, 1971-2 C.B. 230; Rev. Proc. 72-54 1972-2 C.B. 834; Rev. Rul. 75-231, 1975-1 C.B. 158; Rev. Proc. 75-50, 1975-2 C.B. 587.

98. *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974) (interpreting 26 U.S.C. § 7421(a) to prohibit the litigation). Justice Powell wrote the decision for the Court; Justice Douglas did not participate and Justice Blackmun concurred.

99. See 416 U.S. at 746 (explaining that, by paying taxes and exhausting administrative remedies, the University could then have access to judicial review and hence be able to litigate, “albeit” with a delay, the “legality of the Service’s revocation of tax-exempt status”).

100. See *Bob Jones Univ. v. United States*, 468 F. Supp. 890 (D.S.C. 1978), *rev’d*, 639 F.2d 147 (4th Cir. 1981).

101. *Bob Jones Univ.*, 461 U.S. at 577.

102. U.S. Government Certiorari Response of September 1981, *supra* note 13, at 11, 12-16, 136 LANDMARK, *supra* note 12, at 38-43.

efforts by the IRS to investigate whether they too had racially discriminatory practices. Moreover, Congress had prohibited the IRS from using funds appropriated to enforce rules that “would cause the loss of tax-exempt status to private, religious, or church operated schools” unless the investigations pre-dated 1978.¹⁰³ Given the “sensitivity of claims” about the freedom of religion and the congressional constraint, the Government asked the Supreme Court to “dispel the uncertainty surrounding the propriety of the Service’s ruling position and foster greater compliance on the part of the affected institutions.”¹⁰⁴

But a few months thereafter, the Administration’s position changed. In November, Congressman Trent Lott filed a pro se amicus brief¹⁰⁵ that cited the congressional rider prohibiting the IRS from spending money to enforce its policy as he argued that “racial discrimination does not always violate public policy.”¹⁰⁶ He characterized the IRS actions as illicit, “[a]d hoc determinations by unelected bureaucrats” in “fundamental” matters of the First Amendment.¹⁰⁷ Lott’s position was echoed by others and, according to newspaper reports, the government then bowed to “the entreaties of conservative political figures,” including Senator Strom Thurmond, a trustee of Bob Jones University, and “a broad swath of evangelical and conservative religious leaders for whom the long-simmering exemption issue had become a political rallying point.”¹⁰⁸ In January of 1982, the Government filed a memorandum stating its plan to “refund the disputed tax payments” and to restore Bob Jones’ tax-exempt status.¹⁰⁹

A few days later, however, the President went to Congress with legislation that would have expressly authorized the Secretary of the Treasury and the IRS to deny “tax-exempt status to private non-profit educational organizations with racially discriminatory policies.”¹¹⁰ Then,

103. *Id.* at 15-16, 136 LANDMARK, *supra* note 12, at 42-43.

104. *Id.* at 16-17, 136 LANDMARK, *supra* note 12, at 43-44.

105. Congressman Lott explained that the Government “has refused to provide a letter of consent because of a general policy of not consenting to the filing of such briefs by members of Congress.” Lott Bob Jones Amicus Filing, Nov. 27, 1981, *supra* note 26, Motion at (i).

106. *Id.*, Amicus Brief at 18 (citing *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and arguing that while an institution’s right to “pursue diversity is not constitutionally protected . . . its right to practice its religion is protected by the First Amendment”).

107. *Id.* at 19.

108. See Paul Taylor, *Defeat for Religious Right, Vindication for Civil Rights Groups*, WASH. POST, May 25, 1983, at A9. See also Anthony Lewis, *The Court Says No*, N.Y. TIMES, May 26, 1983, at A27 (describing the “real reason for the switch” to be the political pressure for a change in policy and raising concerns that the Département of Justice ought to have been immune to such pressure).

109. Supplemental Brief of the Lawyers’ Committee for Civil Rights Under Law, the NAACP Legal Defense and Educational Fund, Inc., the American Civil Liberties Union, and the American Jewish Committee, as Amici Curiae, 461 U.S. 574 (1983) (Nos. 81-1 & 81-3), *reprinted in* 136 LANDMARK, *supra* note 12, at 740, 741 [hereinafter Supplemental Brief of the Lawyers’ Committee et al.].

110. Supplemental Memorandum for the United States at 2, 461 U.S. 574 (1983) (Nos. 81-1 & 81-3) (filed in February 1982), *reprinted in* 136 LANDMARK, *supra* note 12, at 92-93.

the Treasury Department stated that it would not provide tax-exempt status to various groups until after Congress acted, but that it would grant such status for both Bob Jones and for Goldsboro Christian Schools, whose cases had been consolidated before the Supreme Court.¹¹¹ In short, through a subsequent filing in the Supreme Court and through legislative and executive initiatives, the Government tried to avoid a decision by the Supreme Court by mooting or by changing the record in the case.

But “the Government” was not univocal. Rather, its revised request to the Supreme Court had become a *cause celebre*. The *New York Times* carried front page stories (also recounted in briefs filed in the Supreme Court) about several senior officials of the Administration, joined by “more than 200 lawyers and others in the Justice Department’s Civil Rights Division,” who had expressed “serious concern” about the government’s decision to change its views in *Bob Jones*.¹¹² Internal documents were released, revealing “intense lobbying by key Southern Conservatives in Congress.”¹¹³ Editorials and news stories describing efforts to achieve legislative compromises followed,¹¹⁴ as did several amici filings in the Supreme Court—objecting to the Government’s retreat.¹¹⁵

The Supreme Court responded by appointing William T. Coleman as an amicus to brief and to argue in support of the 1978 IRS action to revoke the tax exemptions.¹¹⁶ Coleman himself had attended a racially segregated elementary school before becoming one of seven black students to matriculate at Germantown High School,¹¹⁷ and was thereafter “the first African American accepted on the Harvard Law Review.”¹¹⁸ By the time

111. Supplemental Brief of the Lawyers Committee et al., *supra* note 109, at 2-3, 136 LANDMARK at 741-42.

112. See Stuart Taylor, Jr., *200 in U.S. Agency Criticize Decision on Tax Exemptions*, N.Y. TIMES, Feb. 3, 1982, at A1 [hereinafter *200 Criticize*]. This article is also cited in the United Church of Christ Bob Jones Mootness Filing, *supra* note 30, at 4-6, which listed, as the senior officials expressing concern, “Roscoe L. Egger, Jr., head of the Internal Revenue Service, Lawrence G. Wallace, the Deputy Solicitor General in charge of these cases; James F. Murray, of the Justice Department’s Tax Division; Theodore Olson, head of the Department’s Office of Legal Counsel, and Peter G. Wallison, General Counsel of the Treasury Department.”

113. *200 Criticize*, *supra* note 112, at A21.

114. See Editorial: *The Law Demystified*, N.Y. TIMES, Feb. 13, 1982, at A24; Stuart Taylor, Jr., *Reagan Tax Exemption Bill Assailed*, N.Y. TIMES, Feb. 2, 1982, at A18; Martin Tolchin, *Reagan May Back Joint Resolution on Tax Exemptions*, N.Y. TIMES, Feb. 4, 1982, at A1.

115. See, e.g., Tribe/Wolfman Bob Jones Brief, *supra* note 30.

116. See *Goldsboro Christian Schools, Inc. v. United States*, 456 U.S. 922 (1982) (Order of April 19, 1982) (inviting Coleman to serve as an amicus to support the judgment below). See also Coleman Bob Jones Amicus Brief, *supra* note 30.

117. See Medal of Freedom, Presidential Medal of Freedom Recipient William T. Coleman, Jr., available at <http://www.medalloffreedom.com/WilliamTColemanJr.htm> (last visited March 24, 2005) [hereinafter Medal of Freedom].

118. See Remarks of President Clinton, awarding William Coleman the Medal of Freedom, Sept. 29, 1995, available at <http://www.clintonfoundation.org/legacy/092995-speech-by-president-in-medal-of-freedom-presentation.htm> (last visited March 14, 2005).

of his appointment as amicus in *Bob Jones*, Coleman was a prominent member of the private bar, had worked with Thurgood Marshall on the *Brown* litigation, and had served in the 1970s as the NAACP Legal Defense Fund's president and as the Secretary of Transportation under President Ford; he was also "a longtime Republican."¹¹⁹

At the oral argument in the fall of 1982, William Bradford Reynolds, Assistant Attorney General and head of the Department of Justice's Civil Rights division, explained the Government's change in views (but not of heart).¹²⁰ Upon rereading the 1913 congressional legislation crafting charitable exemptions, according to Reynolds, the Government had concluded that the statute ought to be construed through a common law understanding of what was then charitable. The Government's revised view was that the 1913 Congress had not given "broad, unfettered authority to the commissioner of the Internal Revenue to grant or deny exempt status based on his independent notions of national public policy."¹²¹

In contrast, court-appointed amicus William Coleman claimed that the federal statute at issue did authorize the IRS to refuse "charitable" institutions tax-exempt status. He argued that the content of what violates "national policy" and what constitutes "charitable" purposes changes with the times.¹²² Specifically, Coleman stated that the commitment to nondiscrimination on the basis of race had become "constitutive," as bedrock a feature of the United States as was the proposition that religions could not engage in "sacrifice."¹²³

The Supreme Court agreed. Writing for the Court, Chief Justice Burger concluded that Bob Jones was not a "charitable" organization qualifying for tax exemptions because charities provided public benefits that racist educational institutions did not.¹²⁴ Further, said the majority, the Government's interest in imposing its rules in lieu of the proffered religious views of the University was "compelling" because the "Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history."¹²⁵ According to the Court, that interest outweighed "whatever burden denial

119. Medal of Freedom, *supra* note 117.

120. "The United States government has no tolerance for racial discrimination in the field of education both public and private." Oral Argument of William Bradford Reynolds on Behalf of the United States, *reprinted in* 136 LANDMARK, *supra* note 12, at 764 (Oct. 12, 1982).

121. *Id.* at 766.

122. Oral Argument of William T. Coleman, *reprinted in* 136 LANDMARK, *supra* note 12, at 777-78 (Oct. 12, 1982) (using as an example that preservation of parks had come to be understood as a charitable activity).

123. *Id.* at 777.

124. *Bob Jones Univ.*, 461 U.S. at 591-95.

125. *Id.* at 604.

of tax benefits placed” on the exercise of the religious beliefs at Bob Jones.¹²⁶

Cover found the Court’s decision unsatisfactory. Cover disapproved of the Court’s nesting its judgment in statutory interpretation¹²⁷ that avoided the constitutional question of whether Congress could grant tax exemption to schools that discriminated on the basis of race. Cover described the ruling as a “failure of the Court’s commitment—a failure that manifests itself in the designation of authority for the decision.”¹²⁸ Cover’s complaint was that the Court assumed

a position that places nothing at risk and from which the Court makes no interpretative gesture at all, save the quintessential gesture to the jurisdictional canons: the statement that an exercise of political authority [of the IRS over Bob Jones] was not unconstitutional.¹²⁹

According to Cover, when the state acts in an imperialist and jurispathic fashion, it should do so because of a profound imperative. The “minority community deserved more, it deserved a constitutional commitment to avoiding public subsidization of racism.”¹³⁰

I think that Cover was wrong about *Bob Jones University*, and wrong in two ways. First, the majority decision can be read as the very kind of jurisgenerative moment that Cover found appealing. True, the Burger opinion is lacking in expression, narrative power, and eloquence. No great “redemptive narrative” is given of the “struggle for racial equality.”¹³¹ But the majority issued its decision—written by a Chief Justice identified with the Republican Administration—over two objections on the Court and amidst heated and public battles in the Congress, in the Department of Justice, and within the Republican Party.

Specifically, Chief Justice Burger refused to take the positions promoted by Justices Powell and Rehnquist. Concurring, Justice Powell had advocated a narrow ruling. For him, the statutory construction of the lower court was not “without logical support” which, when coupled with legislative “acquiescence in and ratification by implication” of IRS policy, merited affirmance.¹³² Yet he worried that the majority could be read as

126. *Id.*

127. *Id.* at 599, n.24 (commenting that many amici, including William Coleman, had argued that the denial of a tax-exempt status was “independently required by the equal protection component of the Fifth Amendment,” but that the Court did not reach the issue). Some commentators believe that the ruling implicitly adopts that position. See Mayer G. Freed & Daniel D. Polsby, *Race, Religion, and Public Policy: Bob Jones University v. United States*, 1983 SUP. CT. REV. 1.

128. Cover, *Nomos and Narrative*, *supra* note 1, at 66. Other commentators shared his concern. As Mayer Freed and Daniel Polsby put it: “Justice required, not a different result from that reached by the Court, but only an acknowledgement of the difficulty.” Freed & Polsby, *supra* note 127, at 31.

129. Cover, *Nomos and Narrative*, *supra* note 1, at 66.

130. *Id.* at 67.

131. *Id.* at 65.

132. *Bob Jones Univ.*, 461 U.S. at 606-07 (Powell, J., concurring in part and in the judgment).

ceding too much power to the IRS.¹³³ Dissenting, Justice Rehnquist, insisted that only Congress could rule out a tax exemption for Bob Jones and it had not done so.¹³⁴ For Justice Rehnquist, what he characterized as the “strong national policy in this country against racial discrimination”¹³⁵ was not strong enough—without action from other legal actors—to overwhelm religiously-grounded racism. Had Rehnquist prevailed, the Court would in fact have ducked the issue by punting to Congress.

Yet despite those objections, despite the Government’s retreat, and despite the appropriation rider that had blocked the IRS from using funds “to enforce any ‘court order’” entered after 1978 that would have prevented racially-segregating schools from obtaining tax exemptions,¹³⁶ the majority refused either the easy, jurisdictional dodge of relying on a change in the record to avoid decision or the response that the merits of the decision belonged to Congress. Instead, the majority insisted that the IRS’s decision was so ordinary as to need no ratification by Congress; racial segregation in education was self-evidently unacceptable. As I read the decision,¹³⁷ the Court owned its conclusion by ignoring the waffling Executive, by finding the Government’s interest “compelling” (rather than “strong” as per Justice Rehnquist), and by determining that Bob Jones University’s practices of racial segregation were not “in harmony with the public interest.”¹³⁸

Chief Justice Burger et al. did indeed face Bob Jones University and prevent it from obtaining a public subsidy through tax exemption. Of equal import, the Court refused the Administration’s proposal to use a jurisdictional device to avoid the Supreme Court from entering a binding judgment. The Court did so by reasoning that anti-segregation obligations permeated the public space such that the IRS had done nothing special, heroic, or expansive when cutting off the tax-exempt status. The commitment to anti-racism was so pervasive that it had turned into both an ordinary feature of “public policy” and at the same time a foundational obligation that overrode religious commitments, however “genuine.”¹³⁹

The majority’s poker-faced insistence on the deep truth of the non-

133. *Id.* at 606, 611-12. See also Paul B. Stephan III, *Bob Jones University v. United States: Public Policy in Search of Tax Policy*, 1983 SUP. CT. REV. 33 (1984) (raising concerns about the “apparent revival” of licensing public policy constructions of the Internal Revenue Code).

134. *Bob Jones Univ.*, 461 U.S. at 612 (Rehnquist, J. dissenting).

135. *Id.*

136. See 127 Cong. Rec. H5392-98 (daily ed. July 20, 1981), cited in Lott Bob Jones Amicus Filing, *supra* note 26, at 5.

137. This reading is consistent with the dissent by Justice Rehnquist, reviewing some of the conflict within the Administration on the policy and objecting to the majority’s holding.

138. *Bob Jones Univ.*, 461 U.S. at 618 (Rehnquist, J., dissenting and quoting the majority opinion at 592).

139. See *Bob Jones Univ. v. United States*, 468 F. Supp. 890, 894 (D.S.C. 1978) (“The Court finds and the defendant has admitted that plaintiff’s beliefs against interracial dating and marriage are genuine religious beliefs.”).

discrimination norm made it much more difficult for legislative and executive actors to continue their efforts to obtain tax-favorable treatment for such discriminators.¹⁴⁰ As then Attorney General William French Smith explained, it was “clear that additional legislation” was not needed.¹⁴¹ And, according to recent commentary, the University “has paid taxes ever since.”¹⁴²

So rather than see (as Cover did) that neither side in *Bob Jones University v. United States* was put to the test necessary for a jurisgenerative moment, I read the decision as an example of what Cover sought from courts and from social orders. State lawmaking had pushed Bob Jones from its flat ban on “Negroes” to a ban on “unmarried Negroes” and then to a ban on dating “Negroes.”¹⁴³ United States law refused that accommodation through a legal regime rich enough to be sustained not only through constitutional dictates by the Supreme Court, but through regulations by low level bureaucrats who came to know that they were obliged to implement norms of non-segregation.

The revised constitutional policy had by then become so entrenched that it was constitutive. Within Cover’s terms, the IRS practices and those of the Justice Department’s lawyers were akin to the lived, thick experience of law’s meaning that he found appealing in sectarian communities. The “200 lawyers and others in the Justice Department’s Civil Rights Division” who had made public their protest against the Executive

140. Newspaper reports quoted one civil rights advocate, Richard Larson of the American Civil Liberties Union, as stating that the “need for legislation was moot.” See Paul Taylor, *Defeat for Religious Right, Vindication for Civil Rights Groups*, WASH. POST, May 25, 1983, at A9. A *New York Times* editorial, highly critical of the Administration “for having dredged up” arguments to give tax-exempt status, quoted President Reagan’s response—“We will obey the law”—and added “It’s about time.” Editorial, *Tax-Exempt Hate, Undone*, N.Y. TIMES, May 25, 1983, at A26.

A quick search for post-*Bob Jones* developments in Congress located some hearings thereafter on the tax-exempt status of private schools and some concerns about IRS enforcement when policies were not overt, but not a spate of bills seeking to shelter organizations like Bob Jones. See, e.g., Subcommittee on Oversight, Committee on Ways and Means, *Tax Exempt Status of Certain Private Schools*, 132 Cong. Rec. D 484 (daily ed. April 28, 1986); 133 Cong. Rec. E 1706 (daily ed. May 4, 1987) (reporting on the Subcommittee for Oversight’s revision of guidelines for the “handling of cases where there is evidence of prior racial discriminatory operations by a private school”). And, as Bob Cover had argued in his 1983 op-ed, the focus of opponents shifted to vouchers and tax deductions for private education. Cover, *Court Has High Aim*, *supra* note 89.

141. Linda Greenhouse, *High Court Bans Tax Exemptions for Schools with Racial Barriers*, N.Y. TIMES, May 25, 1983, at A1.

142. *Bob Jones University: A Boot Camp for Bigots*, J. BLACKS HIGHER EDUC., SPRING 2000, at 15-16. The article focused on President George W. Bush’s visit to the University in February of 2000 to “pin down votes in the state’s most racially conservative territory.”

143. While I find that reconfiguration a positive example, in that normative communities can themselves change and evolve in their views, Cover saw it as a retreat from commitment. See Cover, *Nomos and Narrative*, *supra* note 1, at 51 (“Bob Jones University once interpreted its controlling biblical texts to require that no unmarried black person be admitted to the school; but after the power of the state was invoked to deny the University favorable tax status, that interpretation was withdrawn. I do not know the extent to which the state’s coercive action caused the interpretative change, but I suspect that the change was at least partly attributable to weakness of commitment in the original interpretative act.”).

decision were vindicated;¹⁴⁴ their administrative commitment against racism had been confirmed by the Supreme Court not because it was extraordinary but because it was obvious.

The newspaper stories in the days after the Court ruled tell this story. The *Washington Post's* headline ran: "Court Bars 2 Schools' Tax Break: Administration Is Repudiated on Race Bias Stance."¹⁴⁵ Another story in the *Post* described the decision as a "sharply worded" "defeat for the religious right" and a "fiasco" for the administration that "brought to the close, at least for now" the political flip flopping of the Reagan administration that had "infuriated friend and foe."¹⁴⁶ An editorial, captioned "Bob Jones U Trounced, 8-1," described the administration's attempt to reverse "longstanding tax policy" as "a disastrous legal and political blunder."¹⁴⁷ The *New York Times* categorized the decision as one of several putting "reins" on Reagan by its repudiation of the White House policy that had become "one of the major civil rights debates of recent years."¹⁴⁸ Its editorial was captioned: "Tax-Exempt Hate, Undone."¹⁴⁹

Bob Jones University v. United States is a cram-down of a national norm, an insistence that inside the identity of America, no private enclave can provide an overtly racist educational environment and obtain the state's assistance. Further, the insistence came with an admission of the prior errors made in the name of United States law. Here, Chief Justice Burger's explanation merits repeating: the "Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history."¹⁵⁰

The opinion's willingness to admit the State's role in creating the conditions of oppression has been repeated in other instances when questions of segregation or racial classification have been raised. A recent example is the 2005 decision of *Johnson v. California*, overturning a Ninth Circuit judgment that prison officials, relying on claims of security, could classify prisoners by race and house them initially only with

144. Church of Christ Bob Jones Mootness Filing, *supra* note 30, at 5-6, 136 LANDMARK at 705-706 (citing the *New York Times* articles of Feb. 3 and 4, 1982, at A-1). See also 200 Criticize, *supra* note 112.

145. See Fred Barbash, *Court Bars 2 Schools' Tax Break; Administration Is Repudiated on Race Bias Stance*, WASH. POST, May 25, 1983, at A1.

146. Paul Taylor, *Defeat for Religious Right, Vindication for Civil Rights Groups*, WASH. POST, May 25, 1983, at A9.

147. *Bob Jones U Trounced, 8-1*, WASH. POST, May 25, 1983, at A24.

148. Linda Greenhouse, *Forceful Term of Supreme Court Puts Reins on Congress and Reagan*, N.Y. TIMES, July 10, 1983, at A1. See also Stuart Taylor, Jr., *Tax Exemption Ruling: An Old Question Still Lingers*, N.Y. TIMES, June 14, 1983, at B16 (describing the ruling as a "rebuff" to the administration but also noting that, while very few private religious schools had such overt race-based classifications, covert discrimination remained a problem).

149. *Tax-Exempt Hate, Undone*, N.Y. TIMES, May 25, 1983, at A26.

150. *Bob Jones Univ.*, 461 U.S. at 604.

cellmates of the same race.¹⁵¹ The lower courts had read the Supreme Court's general embrace of a deferential standard of review for decisions by prison administrators¹⁵² to authorize a comparable approach in this case. Justice O'Connor's opinion for the majority flatly rejected such a discount for prison officials' expertise; all race-based classifications, according to her, merit strict scrutiny.¹⁵³ And, as in *Bob Jones*, her majority opinion reiterated the history of discrimination within government systems (in this case in the criminal justice system) as an "especially pernicious" practice that had to be rejected.¹⁵⁴

But as William Coleman had commented in 1982 in his oral argument in *Bob Jones*, other status-based categories—like sex discrimination—were not so self-evidently impermissible. Their use might not render such institutions "uncharitable" for want of enhancing the public welfare. "Where it is crystal clear that there is a national commitment,"¹⁵⁵ the IRS actions were within its powers, but, Coleman noted, had the exclusion been on the basis of sex, it would have been a "much more difficult question."¹⁵⁶ The bar against formal racial classifications established in *Bob Jones* and reiterated in *Johnson v. California*, is a stark and a lone marker, all too readily contrasted with the Court's refusal to focus on racial disparities in the application of the criminal law,¹⁵⁷ its timid engagement with affirmative action in education,¹⁵⁸ its unwillingness to consider other ways in which the Tax Code can facilitate racial discrimination,¹⁵⁹ and its ambivalence about other forms of status-marking

151. 125 S. Ct. 1141 (2005).

152. See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987) (ceding a good deal of decisionmaking to prison administrators and restricting judges to an assessment of the rational relationship between a particular practice and the assertion by correctional officials of legitimate goals to be forwarded).

153. *Johnson v. California*, 125 S. Ct. at 1152-53 (Ginsburg, J., concurring, joined by Justices Souter and Breyer) (reiterating their commitment to a different assessment when classifications by race were used to remedy discrimination and citing the concurring opinion in *Grutter v. Bollinger*, 539 U.S. 306, 344-46 (Ginsburg, J. concurring, joined by Breyer, J.)). Justice Stevens argued that the Court should have held the practice unconstitutional on its face. *Id.* at 1153-57 (Stevens, J. dissenting). Justices Thomas and Scalia dissented on the grounds that prison officials ought to be able to classify on race if needed. *Id.* at 1157-72.

154. 125 S. Ct. at 1149 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

155. Oral Argument of William Coleman, *supra* note 122, in 136 LANDMARK, *supra* note 12, at 784.

156. *Id.* at 786. See Judith C. Miles, *Beyond Bob Jones: Toward the Elimination of Governmental Subsidy of Discrimination of Religious Institutions*, 8 HARV. WOMEN'S L.J. 31 (1985) (arguing for an end to charitable deductions for religions and citing their history of discrimination on the basis of sex).

157. See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996) (refusing discovery to support a claim that African-Americans prosecuted for drug offenses for crack were differentially treated than those prosecuted for cocaine offenses, who were more likely to be white); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (refusing to rely on aggregate evidence of racial disparity in sentencing to invalidate the application of a sentence of death).

158. See *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003). The form of affirmative action that was endorsed both requires institutions to be wealthy enough to devote resources to individualized evaluations and permits great discretion.

159. See David A. Brennen, *Race and Equality Across the Law School Curriculum: The Law of*

divisions, ranging from the Court's rejection of challenges to various sex-based classifications¹⁶⁰ to its toleration of organizational homophobia in the Boy Scouts.¹⁶¹

Cover foresaw this in 1983 when, in an op-ed, he argued that the practical import of the *Bob Jones* decision was limited.¹⁶² In that brief essay, Cover was highly critical of another decision, *Mueller v. Allen*¹⁶³ in which Justice Rehnquist, for a majority of five, upheld a Minnesota statute permitting taxpayers to deduct the cost of private education.¹⁶⁴ Cover argued that permitting states to provide tax deductions for private education, given the "Reagan Administration's proposals for tuition tax credits for parents of children attending private schools" amounted to a

public subsidy for the "white flight" that sabotages effective racial integration in so many communities. . . . It is a pious fraud to say that there is a commitment in America to combat racial discrimination in education while the courts open the way to such dramatic subsidization of white flight. . . . The Court that protects the sanctuaries of white flight and the administration that panders to it are more responsible for the patterns of segregation and inequality in education than are the misguided fundamentalists of Bob Jones.¹⁶⁵

In short, what was wrong with the ruling in *Bob Jones University v. United States* was not (for me) the Court's decision to base its holding on the obviousness (and hence the statutorily-embeddedness) of the illegality of state-enabled racial segregation, but the Court's limited appreciation for what a non-segregation norm ought to entail. The Court could comfortably license the IRS to deny tax-exempt status to institutions that had overt policies of exclusionary racial classification without fear of a slippery slope—that bureaucratic authority would be used to make more profound changes. Indeed, the Court has proceeded, repeatedly, to forbid a broader understanding of the problems of discrimination by prohibiting a range of interventions that attempt to redress the injuries of identity-based subordination.¹⁶⁶

Tax Exemption, 54 J. LEG. EDUC. 336 (2004).

160. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), discussed *supra* in text accompanying note 69 and *infra* notes 176-89 and accompanying text; *Nguyen v. INS*, 533 U.S. 53 (2001). See generally Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 16. Further, about a decade of litigation was required before sex-segregated state-supported education at the Virginia Military Academy and at the Citadel, both of which trained men but not women to be "citizen-soldiers," was found to be unconstitutional. See *United States v. Virginia*, 518 U.S. 515 (1996).

161. See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

162. See Robert M. Cover, *Court Has High Aim*, *supra* note 89.

163. 463 U.S. 388 (1983).

164. *Id.* at 390. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, dissented.

165. Cover, *Court Has High Aim*, *supra* note 89.

166. See generally Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

Cover's second error may be one clearer in hindsight than at the time. Cover faulted the Court for failing to decide whether, as a matter of First and Fourteenth Amendment law, tax exemptions for religious organizations practicing racial segregation were impermissible.¹⁶⁷ The statutory ruling did not, in Cover's view, express a full enough commitment. In contrast, constitutional lawyers are now concerned about the ease with which some members of the Court rely on the Constitution to overturn congressional statutes and to preempt the exercise of judgment by other governmental actors.¹⁶⁸ In the name of fidelity to the Constitution, today's jurispathic Court regularly kills congressional pronouncements rather than—as Robert Post and Reva Siegel have written—facilitate dialogic co-venturing in which the Court and Congress work together to build the meaning of constitutional norms and practices.¹⁶⁹ Today, goes the logic of the Court, if a rule is of constitutional dimensions, the Court has exclusive control.¹⁷⁰ Moreover, that control has been used to limit the degree to which inventive remedial regimes can be developed by either Congress or administrative agencies and private organizations.¹⁷¹

In this era, such “commitment” by the Court¹⁷² to a constitutional rule has generated instances of dysfunctional rigidity. State sovereign immunity is one such example. Formerly a doctrine mixing constitutional and common law precepts, it has now been reconfigured as a constitutional prohibition on congressional use of the Commerce Clause to provide individuals with monetary remedies against states that violate federal statutes.¹⁷³ Thus, the very moderation of the Court in *Bob Jones* that left open space for many levels of government to generate policy has advantages over a juriscentric constitutional practice that so constrains other actors. The liberal state's encounter with Bob Jones University provided the occasion for a wide array of federal officials to act.¹⁷⁴ And,

167. Cover, *Nomos and Narrative*, *supra* note 1, at 66.

168. See, e.g., Larry D. Kramer, *The Supreme Court, 2000 Term -- Foreword: We, the Court*, 115 HARV. L. REV. 4 (2001).

169. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

170. Some blurry boundaries remain. See, e.g., *Lara v. United States*, 541 U.S. 193 (2004), discussed in Resnik, *Myths and Methods of Marbury*, *supra* note 68, at 120-23 (describing the constitutional common law status of some rules of federal Indian law).

171. See, e.g., *Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that Congress had exceeded its authority under Section 5 of the Fourteenth Amendment and could not abrogate states' immunity from suit given the record information about state activities related to persons with disabilities); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (limiting governmental affirmative action); *New York v. United States*, 505 U.S. 144 (1992) (holding unconstitutional take-title provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985).

172. Cover, *Nomos and Narrative*, *supra* note 1, at 66 (“the failure of the Court's commitment”).

173. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

174. See Neal Devins, *On Casebooks and Canons or Why Bob Jones University Will Never Be*

as the sequence of events made plain, a country that had once mandated segregation by law had come to reject that idea so thoroughly that it would not tolerate race-based segregation even when predicated upon religious interpretation.

IV. DISSIDENT VOICES AND UNDEMOCRATIC ITERATIONS: TRIBES AND VEILS

Insofar as I am aware, *Bob Jones* was an “easy” case in one respect: none of the University’s members openly contested the claim of a scriptural obligation to segregate the races.¹⁷⁵ Further, Robert Cover did not take up the question of the internal constitution of Bob Jones University, or of the Amish, the Mennonites, or the Jews. He did not interrogate the power within communities of culture whose passionate commitment to principles he recognized as jurisgenerative.

But many such conflicts raise questions about which members of paideic communities have the authority to make community law. As the focus on contestation moves from racialized identities to engendered identities, and as so many communities—both secular and religious—are patriarchal, today’s conflicts about community traditions often entail struggles about the meaning of equality for women. As I noted at the outset, evocative conflicts include debates about the use of patrilineal membership rules and the veiling of women. To conclude, I focus on the problem of the interaction among internal dissidents, paideic communities, and the secular state.

In introducing my concerns in this essay, I offered two examples of gendered conflicts, one involving Indian tribes and the other involving Muslim girls wearing veils. Turn first to a case in the United States, filed in the 1970s by Julia Martinez, challenging the refusal of the Santa Clara Pueblo to consider her children (whose father was a Navajo) to be Santa Claran. Without such recognition, her children could not enroll as Pueblo members eligible for federal health benefits and tribal inheritance land rights.¹⁷⁶ The Pueblo invoked its constitution of 1939 that specified a patrilineal rule.¹⁷⁷ Contesting the rule, Julia Martinez relied on a 1968 federal statute, the Indian Civil Rights Act, giving tribal members enforceable rights of equal protection against their tribes.¹⁷⁸

The Supreme Court’s conclusion was the kind of jurisdictional decision

Part of the Constitutional Law Canon, 17 CONST. COMM. 285 (2000). Despite this title, Devins argued that first year law students ought to be required to read the decision.

175. As noted, some of those filing to uphold Bob Jones’s right to ban interracial dating disagreed, as Christians, with its interpretation of the Scriptures. *See supra* note 33.

176. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 52-53 (1978).

177. *Id.* at 53.

178. The Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8).

Cover identified as a failure. The Court held that federal courts lacked jurisdiction to hear Ms. Martinez because, when enacting the 1968 statute, Congress had specifically given federal courts habeas corpus jurisdiction but had not affirmatively stated that the federal judiciary had authority to entertain implied private causes of action against tribal officials.¹⁷⁹ Ms. Martinez's only remedy, according to the Court, was to seek relief in tribal courts¹⁸⁰ from which no federal review was available.

Justice Thurgood Marshall's opinion for the majority—blocking access to the federal courts—rested in part on his awareness of longstanding federal efforts to destroy tribal identity. To implement that goal, the United States had instituted policies aimed at disaggregating tribal land and forcing migration.¹⁸¹ Justice Marshall sought to help the reinvigoration of tribal self-governance by insisting that tribal sovereignty, predating that of the United States, ought to remain unimpaired unless affirmatively divested by Congress.¹⁸² In Coverian terms, he worried about the jurispathic powers of courts and understood well the jurisgenerative possibilities, especially of communities that had long been subordinated.

His ability to command a majority, however, stemmed also from the fact that the Pueblo's patrilineal norm was not foreign but familiar within the United States. Not only was such a rule shared by the English common law, but the Pueblo's patrilineal rule had only been codified upon the Pueblo's interaction with American cultures. Incentives created by the United States pressed tribes to write constitutions and to detail constraints on those eligible for federal benefits.¹⁸³ Moreover, in 1978, when the case was litigated (and today), federal constitutional commitments to the equality of women and men continue to permit distinctions in citizenship rules based on whether those rights stem from mothers or fathers. Specifically, in 2001, the Supreme Court upheld an immigration statute that treated differently children born abroad and out of wedlock, depending upon whether their mother or their father was an American citizen.¹⁸⁴

The Court's refusal to insist that the Pueblo's rule should bow (in any

179. *Santa Clara Pueblo*, 436 U.S. at 58-59, 72. Justice White dissented. *Id.* at 72-83.

180. *Id.* at 65-66 (Marshall, J., writing for the majority). Yet within a month of that decision, the same Supreme Court made plain that tribal justice would not suffice for a white man accused of causing havoc during a tribal celebration. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). See generally Resnik, *Myths and Methods of Marbury*, *supra* note 68.

181. General Allotment Act of 1887, 24 Stat. 388 (1907) (also known as the Dawes Act).

182. *Santa Clara Pueblo*, 436 U.S. at 62-65.

183. See the Indian Reorganization Act of 1934, 48 Stat. 984, codified as amended at 25 U.S.C. § 461 et seq; Resnik, *Dependent Sovereigns*, *supra* note 68, at 704-16 (describing the hundreds of such constitutions that began with the phrase "We, the People" and the history of the Pueblo's 1935 Constitution that did not include that rule, its revision in 1939, and the role played by the Bureau of Indian Affairs in overseeing the rulemaking by tribes).

184. See *Nguyen v. INS*, 533 U.S. 53 (2001).

respect) reveals that the federal equality norm that Ms. Martinez hoped would trump the Santa Clara Pueblo's claim to its self-constitution was too lightly-held for federal judges to force the Pueblo to give way. Yet, time and again in federal law relating to Indian tribes, when the federal objective is of sufficient import, the federal courts, Congress, and the Executive have not hesitated to displace tribal self-governance.¹⁸⁵

When the decision in *Santa Clara Pueblo* is set in that context and then considered alongside that of *Bob Jones University*, one can see that disabling classifications based on sex are not as intolerable as are disabling classifications based on race. And (here sharing Cover's concern about the misuse of doctrines of avoidance), the jurisdictional dodge of *Santa Clara Pueblo* permitted the Court to avoid a frank engagement with what was at stake. The decision addressed the history of tribal oppression but not much was made of the inequality of women, nor did the Court explore methods of mitigating the federal government's intrusion while forwarding women's rights.

My own solution would have been to require the provision of many federal benefits to Ms. Martinez's children while remitting the question of tribal recognition to the Pueblo.¹⁸⁶ But my wish for an open exchange assumes that women's ability to devolve membership to their children as do men would have been understood by the Court as a serious counterweight to tribal governance. Justice Marshall might have thought that it would do more good for tribes and less harm to the goal of women's equality to shape the judgment as he did.

The *Santa Clara Pueblo* litigation also brings to the fore the question of who creates and continues a community's expression that certain norms are constitutive—either for tribes or for the nation-state. The record in that litigation suggested that a patrilineal membership rule evolved over time, as opportunities for intermarrying grew and as incentives to limit membership increased.¹⁸⁷ But the emergence of a patrilineal rule—as contrasted with one of naturalization (extant from 1935 to 1939) or of matrilineage (a tradition of the Navajo Nation, for example)—depended on the relative power of men and women to make the rules of and to speak on behalf of “the” Pueblo. Similarly, the resilience of sex-based classifications in United States' law—displayed in this nation's laws on citizenship and the military, as well as its deference to religious communities' classifications by sex—occurs in a country in which men are eighty-six percent of the members of the Senate, about eighty-four

185. Illustrative are the decisions in *Oliphant v. Suquamish Tribe*, and in *Nevada v. Hicks*, discussed *supra* notes 70-71, and accompanying text.

186. This solution is imperfect, as one of the federal benefits sought was assistance with building a home on the Pueblo.

187. See Resnik, *Dependent Sovereigns*, *supra* note 68, at 714-16.

percent of the House of Representatives,¹⁸⁸ and more than eighty percent of the sitting, life-tenured federal judges.¹⁸⁹

The question of voice is also central to the debate about the veiling of women, the French principle of *laïcité*, and the prohibition on “conspicuous” symbols of religion in France’s public schools. Much of the discussion takes for granted that the nation-state fears the religiosity and the “otherness” of Islam. But the claimed secularity of the French social order developed through conflicts during the 1789 revolutionary era and then during the Third Republic, at the turn of the twentieth century when that nation was concerned about limiting the power of the Catholic Church.¹⁹⁰ From this vantage point, the principle of *laïcité*, founded upon profound anti-Catholic sentiments and developed during years in which women had no official voice in the French government, has now become a means to protect Christianity from perceived threats from other religious traditions.

Who speaks for French women today remains at issue. The Stasi Report, officially commissioned by the Government, presents itself as speaking “for” young girls by explaining that its proposed ban on the veil respects their equality.¹⁹¹ But in January of 2004, an estimated 20,000 French Muslims—described as “mostly women wearing various forms of hijab”—protested in several cities. They were quoted as claiming that they, not their “fathers nor husbands,” had chosen to wear headscarves.¹⁹² As Nilüfer Göle has explained the shifting valence of that practice:

The headscarf, symbol of backwardness, ignorance, and subservience for Muslim women in modern contexts, fights back to become, once again, as it has thought to be in the Islamic past, a symbol of distinction and prestige for urban Muslim women.¹⁹³

Veiling can be both empowering and oppressive, protective and

188. See <http://clerk.house.gov/members/memFAQ.html#women> (noting that fourteen women are in the Senate and sixty-eight women in the House).

189. See <http://www.fjc.gov>. From this website, one can request a list of all sitting judges, including those with senior status, by gender. As of March of 2005, the website indicated that 223 women and 1057 men were members of the United States life-tenured judiciary.

190. Gunn, *supra* note 17, at 432-33. He argues that while *laïcité* is currently claimed to be a “pillar” of that country’s commitment to tolerance, in fact it was once a mechanism to limit the power of the Roman Catholic Church. *Id.* at 428-29, 432-41.

191. Stasi Report, *supra* note 23, at 4.2.2.1 (“L’école”) (commenting that “Pour celle qui le portent, le voile peut revêtir différentes significations. Ce peut être un choix personnel ou au contraire une contrainte, particulièrement intolérable pour les plus jeunes. . . . Pour celles qui ne le portent pas, la signification du voile islamique stigmatise ‘la jeune fille pubère ou la femme comme seul responsable du désir de l’homme,’ vision qui contrevient fondamentalement au principe de l’égalité entre les hommes et les femmes.”).

192. Paul Silverstein, *Headscarves and the French Tricolor*, MIDDLE EAST REPORT ONLINE, Jan 30, 2004, ¶ 23, available at <http://www.merip.org/mero/mero013004.html> (“ni pere, ni mari, le foulard on l’a choisi”).

193. See generally Nilüfer Göle, *The Voluntary Adoption of Islamic Stigma Symbols*, 70 SOC. RES. 817, 821 (2003).

authorizing for some young women while constraining for others, a mode of rebellion by young women against the practices of their parents or a mark of limitations imposed by their parents. And how much French society is committed to enabling young women to free themselves from subjugation based on gender is questionable in light of the recent “beauty contests” about which female will represent the new “Marianne,”¹⁹⁴ long a symbol of France.¹⁹⁵

The debate about women and their expressions of culture and religion in France is now well into its second decade. The meanings of the equality of women and men, of the principle of *laïcité*, and of veiling are proffered by a range of authorities within France (the Conseil Constitutionnel, the Stasi Report, the bureaucracy of the state’s Education Ministry), various Muslim communities, individual protestors, and dozens of commentators.

Through those iterations and conflicts, the significance of *laïcité*, of the veil, and of one aspect of French identity has already changed. As Göle has insightfully explained, the veil itself has come to be identified with France¹⁹⁶ and, if not quite as emblematic as Marianne, closely bound up with the French State. Indeed, when two French reporters were captured in Iraq, the attackers demanded the retraction of the rule against veiling.¹⁹⁷ Almost immediately, widespread protests—with Islamic women at their center—emerged, objecting to efforts by outsiders to interfere with their internal, their very French, battle. As one journalist covering the events put it: “Paradoxically, for the first time, French Muslims have united on a major political issues and rallied behind the French government. They

194. In 1999, the Association of Mayors of France sponsored a contest to select a twenty-first century “Marianne” and picked a model and actress, Laetitia Casta, to serve as the model for the bust of the icon that was to be featured in over 36,000 town halls across France. See Debra Olliver, *Libert, Egalité*, 36C, Salon.com (Feb. 19, 2000), available at <http://dir.salon.com/people/feature/2000/02/19/mkmarianne/index.html> (last visited Apr. 4, 2005); *Model Choice for France*, BBC NEWS (Oct. 8, 1999), available at <http://news.bbc.co.uk/1/hi/world/europe/468595.stm> (last visited Apr. 4, 2005). The contest was repeated in October of 2003, when a television star, Evelyne Thomas, was chosen as the new “Marianne.” See *Chat Show Host Is France’s New Marianne*, BBC NEWS (Oct. 17, 2003), available at <http://news.bbc.co.uk/2/hi/europe/3200840.stm> (last visited Apr. 4, 2005). In addition to statutes in town halls, the image of Marianne appears on many official French documents, stamps and coins, as well as in paintings old and new and on a variety of merchandise. Originally “the anonymous peasant,” the “unassuming unaristocratic girl” or the “cherished figure of political emancipation,” latter day Mariannes have been publicly recognizable women, including Bridget Bardot, Catherine Deneuve, Casta, and Thomas. See Debra Olliver, *supra*.

195. See MAURICE AGULHON, *MARIANNE INTO BATTLE: REPUBLICAN IMAGERY AND SYMBOLISM IN FRANCE, 1789-1880* (Janet Lloyd trans., 1979). A woman wearing a Phrygian cap (itself a marker of liberty worn by freed slaves in Greece) became a common figure during the French Revolution, also serving as an allegorical representation of Liberty and of the Republic. At some point, the name Marie-Anne and then Marianne became attached to a specific embodiment of a female identified with France.

196. Nilüfer Göle, Lecture at Whitney Humanities Center, Yale University (Sept. 22, 2004). See also Beller, *supra* note 18, at 597 (describing some Muslims arguing from their understanding of themselves as French about their right to wear scarves).

197. See Elaine Sciolino, *The Reach of War: Terrorism, Hostages Urge France to Repeal Its Scarf Ban*, N.Y. TIMES, Aug. 31, 2004, at A8.

essentially told the hostage-takers that they should stay out of France's affairs."¹⁹⁸

V. GENERATIONAL INTUITIONS

By bringing together the examples of racial segregation, patrilineal membership rules, and veiling, I hope to have underscored how much our views about the legitimacy of norms (held by a nation-state or by a paideic community) are shaped by our contemporary culture, intolerant of certain practices and unquestioning of others. During one era, Bob Jones University's segregationist practices were not seen as problematic, whereas within three decades, they were understood to be so antagonistic to the American project as to be subject to an IRS penalty without fear of over-empowering that bureaucracy. In contrast, in terms of which practices respect and which undermine women and men's equal treatment, we remain deeply conflicted.

Thus, Robert Post's commentary on Robert Cover correctly focuses us on the importance of generational contexts as we consider the plausibility of laws and practices.¹⁹⁹ Post located Cover as part of "a generation, of my [Post's] generation, which faced a violent state that drafted its citizens to fight an alien war in Vietnam."²⁰⁰ Post is right to underscore political socialization, but Robert Cover did not come of age during the Vietnam conflict. Rather, a bit older than Post, Cover's formative experiences took place when the state itself tolerated the violence of whites against blacks and failed, for decades, to intervene. As Steve Wizner has told me, in the 1960s, Cover gave up a scholarship to go to Asia and instead went to the deep South in the United States to join freedom fighters challenging segregation.²⁰¹ Having seen the legacy of slavery, Cover responded with *Justice Accused*,²⁰² his assessment of the judiciary's complicity in the practices of slavery. And, as is evident from my discussion here, the signature generational conflict for me is about gender equality.

Robert Cover worried, from his lived experiences and his deep understanding of United States history, about judges who did too little, who contributed too little, who aborted the dialogue that presses normative communities to make good on their own views, or to change them, and the state to make true its meanings, or change them. Today, we worry about a Supreme Court that does too much, willing to exert its own claim and

198. See Elaine Sciolino, *Ban on Head Scarves Takes Effect in a United France*, N.Y. TIMES, Sept. 3, 2004, at A8.

199. Post, *Jurispathic Courts*, *supra* note 44.

200. *Id.* at 14.

201. There, he was jailed and assaulted. See Stephen Wizner, *Tribute to Robert M. Cover*, 96 YALE L.J. 1707 (1987); see also Robert A. Burt, *Robert Cover's Passion*, 17 YALE J.L. & HUMAN. 1, 3 (2005).

202. See COVER, *supra* note 74.

unwilling to listen to or invite in a multitude of co-lawmakers, co-lawmakers at the level of the imperial state itself. Siegel and Post complain about the Court's evisceration of a role for Congress.²⁰³ I complain about the Court claiming that it knows what states want, when it speaks in the name of "federalism" even as states themselves appear before the Court on both sides, disagreeing about what ruling would be "state-regarding."²⁰⁴ We have no dearth of complaints about the courts, then and now.

But Robert Cover's guidance, wisdom, and insight transcend both his worries, circa 1980s, and ours, now in the twenty-first century. For judges alone are never enough to give law meaning. What Cover taught was that the practice of the law, the daily engagement with its implications, and the acceptance of the costs of living a legal regime were the prerequisites to sustaining any set of governing rules. Jurisgenerative practices are laborious, engaging, intensive, time-consuming, exhausting, and often deeply costly, as well as joyful, obliged, and comforting.

Bob Cover also liked sports, invoking upon occasion analogies between baseball and law.²⁰⁵ In that spirit, a brief summary of my understanding of Cover's understanding of law's meaning can be put into this other vocabulary: No pain, no gain.

203. See Post & Siegel, *supra* note 169; Robert C. Post & Reva B. Siegel, *Protecting the Court from the People: Juriscentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003).

204. See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001); Judith Resnik, Joshua Civin, Daphne Renan, & Laura Slacta, *Federalisms: When States Disagree* (manuscript on file with the author).

205. See, e.g., Robert M. Cover, *Your Law-Baseball Quiz*, N.Y. TIMES, Apr. 5, 1979, at A23. There Cover listed John Marshall, Earl Warren, Bryon White, Oliver Wendell Holmes, Jr., Felix Frankfurter, Robert Jackson, and Louis Brandeis and invited readers to pair each justice with "the baseball figure who bears the same relationship to baseball as the justice bears to law." He then provided answers such as that both Earl Warren and Yogi Berra were "enormously effective performers on teams with many stars. . . . Both saw through excessive thought to the true essence of their game." *Id.*

